

Improving the experience of injured workers:

A review of WorkSafe
Victoria's management of
complex workers'
compensation claims

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Contents

Contents	i
Acknowledgements	ii
Terms of Reference	iii
Glossary	vi
Executive summary and recommendations	ix
Indicative WorkSafe reform implementation timeline	xlii
Part A – Background and context	1
1. Conduct of the Review	2
2. History of Victoria's workers' compensation scheme	15
3. Current legislative structure	26
4. Administration of the workers' compensation scheme	51
5. Previous reviews of the agent model	71
Part B – Submissions and research	94
6. Identification of complex claims	95
7. Management of complex claims	138
Part C – Terms of Reference	187
8. Failure of the agent model	188
9. A claims management model for the future	201
10. Further improvements to the scheme	245
11. Financial health of the scheme and emerging risks	286
12. Implementation of recommendations	303
Appendix A – Stakeholder consultation list	314
Appendix B – Expert panel members	317
Appendix C – Submissions to discussion paper	322
Appendix D – Submissions to options paper	325
Appendix E – Jurisdictional comparison of compensation schemes	326
Appendix F – Options paper	336

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Terms of Reference

Review of the Agent Model into the Administration and Management of Complex Claims

Background

1. The Victorian WorkCover Authority (WorkSafe) is responsible for the administration of Victoria's workers' compensation scheme, known as WorkCover, to ensure it provides support for workers with a work-related injury, is sustainable, fair and affordable to businesses.
2. WorkSafe administers the scheme by delegating most of its claims management and premium collection functions to appointed insurance agents. Agents are required to determine liability and entitlement for all claims in accordance with relevant legislation (principally the *Workplace Injury Rehabilitation and Compensation Act 2013* (WIRC Act)).
3. Collectively, the agents manage around 90,000 claims every year and are remunerated through an annual service fee and financial incentives for achieving performance measures. There are currently five scheme agents whose contracts with WorkSafe expire in June 2021.
4. According to WorkSafe's 2018 Annual Report, most claims managed by agents are neither complex nor contentious, with 59 per cent of injured workers returning to work within 13 weeks, 75 per cent before 26 weeks and 90 per cent prior to 52 weeks.
5. However, once claims have progressed beyond 130 weeks they are defined as complex claims. Complex claims have longer decision timelines, a higher rate of rejection, involve greater lengths of time off work and have a higher rate of disputation over agent decisions.
6. As at 30 June 2018, these claims represented about a quarter of the 18,519 active weekly payments in the scheme, or about seven per cent of the total 63,085 active claims in the scheme (including those involving medical treatment only).

Complex Claims

7. The Victorian Ombudsman undertook an investigation in 2016 into the management of complex workers' compensation claims and Worksafe oversight.
8. The investigation highlighted several deficiencies that indicated a growing number of complex claims were being mishandled by agents, including evidence of:
 - a. unreasonable decision-making across all five agents

Improving the experience of injured workers

- b. agents maintaining unreasonable decisions at conciliation, forcing workers to take the matter to court or terminate their claim without compensation
 - c. financial rewards encouraging agents to focus on rejecting or terminating WorkCover entitlements, and
 - d. limited accountability or oversight mechanisms of agent decisions.
9. In 2019, the Victorian Ombudsman conducted a follow up investigation and found that despite targeted policy and system reforms, little had improved in the handling of complex workers' compensation claims since 2016, with continued unreasonable agent decision making and poor agent culture driven by financial rewards and ineffective WorkSafe oversight.
10. In response, the Ombudsman made 15 recommendations, two to government and 13 to WorkSafe. These Terms of Reference implement Recommendation 1 which stated:

Commission an independent review of the agent model to determine how and by whom complex claims should be managed, taking into account:

- a. the need to ensure appropriate compensation is provided to injured workers, as well as the financial viability of the scheme
- b. the experience of other accident compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international workers compensation jurisdictions.

Scope of Review

11. The Review will assess the suitability, adequacy and effectiveness of the outsourced agent model in the administration and management of complex claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (the Act).
12. The Review will determine how and by whom complex claims should be managed to maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme.
13. For the purpose of the Review, complex claims are defined as those where the injured worker has received 130 weeks or more of weekly payments (including claims that were suspended or terminated during this period).
14. However, irrespective of the complexity of a claim, the Review should consider the personal circumstances of claimants which may ultimately contribute to them having 'complex claims', as defined at 130 weeks.
15. In forming its findings and developing recommendations the Review should inquire into:

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- a. Whether the agent model is effective in delivering and achieving positive health and recovery outcomes, including prompt, effective and proactive treatment and management of injuries.
 - b. Whether case management processes and practices for complex claims reflect best practice and provide tailored treatment and support based on biopsychosocial factors, individual circumstances and medical advice.
 - c. Whether policy, oversight and governance arrangements, including financial and performance incentives support and promote best practice, timely, sustainable and quality decision making by agents.
 - d. Any other matters that the Reviewer deems necessary including any potential system wide implications.
16. In undertaking the Review, the Reviewer will consider:
- a. the experience of other compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international compensation jurisdictions or insurance schemes including the National Disability Insurance Scheme;
 - b. the Victorian Ombudsman's Report in 2016 and 2019 into the management of complex workers' compensation claims and WorkSafe oversight;
 - c. the impact of emerging risks which may impact claim numbers and to the viability of the workers' compensation scheme;
 - d. any relevant work that is being or has already been undertaken in this area, including recent or ongoing legislative and regulatory reforms relating to the Act and workers' compensation system; and
 - e. the implications of retaining, limiting or removing agents from performing claim management functions on behalf of WorkSafe.
17. Where the Reviewer finds the policy, legislative or regulatory framework could be improved, the Reviewer must provide recommendations to give effect to such improvements.
18. In forming its recommendations, the Review must have regard to the implications of any changes for the financial viability of the workers' compensation scheme and the cost of WorkCover insurance for employers.

Glossary

ACCS—Accident Compensation Conciliation Service	ACCS is a statutory authority that provides an independent alternative dispute resolution service to facilitate the resolution of workers' compensation disputes in Victoria. Discussion of the ACCS's role in the dispute resolution process can be found in Chapter 3.
Agents	WorkSafe appoints agents to manage employers' WorkCover insurance and injured workers' compensation claims on its behalf. These agents are Allianz, CGU, Gallagher Bassett, EML Vic Pty Ltd and Xchanging. CGU will cease to act as a WorkSafe agent after 30 June 2021. The role of agents in the WorkSafe scheme is discussed in detail in Chapter 4.
Agent model	WorkSafe generally delegates claims management and premium functions to insurance and claims administration companies which act as claims agents. The outsourcing of claims management by WorkSafe to agents is known as 'the agent model'. Discussion of the agent model is found in Chapter 4.
APA—Annual Performance Adjustments	A system of weighted measures that provides financial incentives and penalties for agents, to encourage alignment with WorkSafe's key performance indicators. Agents are rewarded for good performance and penalised for poor performance. The APA's are discussed in detail in Chapter 4.
Biopsychosocial model	The biopsychosocial model considers biological, psychological and social aspects of injury and illness, in contrast to the traditional 'biomedical' model which focuses only on biological/physical factors. In a workers' compensation context, the biopsychosocial model considers the importance of the individual circumstances of the worker in assessing claims complexity. The biopsychosocial model is discussed in detail in Chapter 6.
Case / Claims manager	The primary contact at an agent for the worker and employer. They are responsible for managing claims by making decisions regarding entitlements under the WIRC Act, facilitating payment of entitlements, and co-ordinating the treatment and recovery of injured workers.
Claims manual	The claims manual is a guide developed by WorkSafe Victoria to assist WorkSafe agents and staff to make decisions in accordance with workers' compensation legislation and policies. The claims manual is discussed in detail in Chapter 4.
Complex claims	The Terms of Reference for the Review define complex claims as being those where an injured worker has received 130 weeks or more of weekly payments. A discussion of the factors involved in categorising claims as complex is found in Chapter 6.
Employer	Employers are defined broadly under the WIRC Act and includes the entity for whom a worker works, or with whom a worker agrees to perform work, as well as a person deemed to be the employer under section 3 of the WIRC Act.

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IME—Independent Medical Examiner	<p>A practitioner appointed by a WorkSafe agent or self-insurer under the WIRC Act to examine and report on an injured worker’s injury or illness, work capacity and treatment. Reports from IME’s may be used as a basis for making decisions about entitlement to compensation. An IME must be approved by WorkSafe and may be a:</p> <ul style="list-style-type: none"> • medical practitioner; or • registered dentist, physiotherapist, chiropractor, osteopath or psychologist.
Injury	<p>As defined under section 3 of the WIRC Act, ‘injury’ includes any physical or mental injury, and also includes a recurrence, aggravation, acceleration, exacerbation or deterioration of any pre-existing injury or disease.</p>
Medical and like expenses	<p>The reasonable cost of any medical and related treatment, hospital treatment and rehabilitation services that are deemed reasonably necessary and required as a result of a workplace injury.</p>
Occupational rehabilitation providers	<p>Injured workers may be referred to occupational rehabilitation providers (which must be approved by WorkSafe) for assistance with returning to work or job seeking. Occupational rehabilitation services may include:</p> <ul style="list-style-type: none"> • rehabilitation or workplace assessments; • vocational assessments or vocational re-education; and • advice and coordination relating to job modifications, workplace accommodations or job seeking.
RTW—Return to Work	<p>Return to work rates are commonly used to measure the performance of a workers’ compensation scheme. There are obligations on workers and employers intended to encourage injured workers to return to work. These return to work obligations are discussed in Chapter 3.</p>
Safe Work Australia	<p>Safe Work Australia is an Australian government statutory body whose objective is to develop national policy relating to workplace health and safety and workers’ compensation.</p>
Self-insurers	<p>WorkSafe approves some large employers to act as self-insurers. Self-insurers manage and underwrite their own workers’ compensation claims and are not part of the agent model.</p> <p>As at 30 June 2020, there were 40 self-insurers operating in Victoria, representing about 7% of total scheme remuneration.</p>
TAC—Transport Accident Commission	<p>The Transport Accident Commission, a Victorian statutory authority that pays for and manages treatment and benefits for transport accidents.</p>
Treating health practitioner	<p>A medical practitioner or an allied health service provider, who provides treatment to an injured worker. Workers select their preferred treating health practitioner for treatment.</p>
WCIRS—Workers’ Compensation Independent Review Service	<p>The Workers’ Compensation Independent Review Service provides a free service for injured workers to review specified types of decisions, where the dispute has not been resolved at conciliation. Further details about the WCIRS and its role in the dispute process are found in Chapter 3.</p>

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WIRC Act	The <i>Workplace Injury, Rehabilitation and Compensation Act 2013 (Vic)</i> ; the legislation that governs the workers' compensation scheme in Victoria.
WorkCover	The Victorian workers' compensation scheme; a statutory no-fault, compulsory insurance scheme covering workplace injuries in Victoria.
Worker	Section 3 of the WIRC Act defines who is a worker under the scheme. For the purpose of the WorkCover scheme, workers may be employees, or may be people engaged in work that does not give rise to a traditional employee/employer relationship. For example, contractors may be regarded as workers under the WIRC Act if the facts of the working relationship meet various legal tests.
WorkSafe Victoria	<p>WorkSafe Victoria is the trading name of the Victorian WorkCover Authority. The terms WorkSafe and Victorian WorkCover Authority (VWA) are used interchangeably in this Report.</p> <p>WorkSafe is responsible for overseeing and managing the Victorian workers' compensation scheme and administering the WIRC Act. WorkSafe is also Victoria's workplace health and safety regulator. WorkSafe's role in administering the scheme is described in Chapter 4.</p>

Executive summary and recommendations

Restoring balance: returning the workers' compensation scheme to its original intent

- 1 When the Victorian treasurer, Mr Rob Jolly, introduced the *Accident Compensation Bill* into the Victorian Parliament to establish the 'WorkCare' scheme in July 1985, he described it as 'the most significant economic and social reform introduced to the Parliament in a quarter of a century'. The previous multi-insurer workers' compensation system was to be replaced by a central fund administered by a government body called the Accident Compensation Commission. That Commission was to oversee a social insurance system which would prioritise the prevention of industrial injury and occupational disease and the rehabilitation of those injured or made ill by their work. As the name of the new scheme suggested, those who were injured at work would receive care.
- 2 However, the scheme that was ultimately enacted was not what the government of the day had intended. The government's need to secure the passage of the Bill through an upper house that it did not control necessitated a political compromise that went to the heart of the new scheme. The private insurers would continue to have a role but not the one they had previously exercised. Henceforth, they could tender for roles as claims administrators on behalf of the Accident Compensation Commission. Thus was created the so-called workers' compensation 'agent model' which is the subject of this Review.
- 3 A submission to this Review from Mr Alan Clayton, an expert in workers' compensation policy who has been examining compensation schemes for four decades, described the agent model that emerged as a result of this compromise as a 'mutant genus that has no recognised progenitor'.¹ The agent model is a hybrid of a private insurance scheme and a centrally funded scheme which has some of the worst features of each and few of the benefits.
- 4 The scheme introduced in 1985 has had a turbulent history and has had several name changes along the way. In many respects the 2021 version, now called 'WorkSafe', bears little resemblance to the 1985 model. But, against the odds, there has been one constant—the agent model that started as a political compromise has become the scheme's most enduring feature. The agent model has endured despite no fewer than eight independent reviews since 2001 that

¹ Submission DP3 (Alan Clayton) 1.

have called into question its ability to address the needs of injured workers, especially those with challenging or complex claims.

5 In the most recent of those reviews, the Victorian Ombudsman was excoriating in her criticism of both WorkSafe’s agents and WorkSafe itself. The Ombudsman was conducting her second investigation of WorkSafe’s management of complex claims. While the Ombudsman’s earlier report raised serious concerns about WorkSafe’s treatment of injured workers with complex claims and ‘gaming’ of the system by WorkSafe’s agents, she was not prepared to conclude at that time that the system itself was broken.²

6 However, a further in-depth examination of 102 complex claims files in 2019 led the Ombudsman to conclude that unreasonable decision making by WorkSafe’s agents was ‘contributing to negative outcomes for already vulnerable injured workers’.³ The unreasonable decision-making identified in the report included:

- ‘cherry picking’ evidence to terminate or reject claims even where the evidence was unclear, contradictory or inconclusive;
- ‘doctor shopping’ and sending workers to ‘agent-friendly’ independent medical examiners to obtain an opinion unfavourable to the worker;
- maintaining decisions at conciliation which were ‘arguable’ but had no reasonable prospect of success thus forcing workers to take matters to court to vindicate their rights; and
- terminating workers’ entitlements without sufficient evidence.⁴

7 The evidence and submissions that I have received in the conduct of this Review corroborate what the Ombudsman found. That evidence is detailed in the Report but some examples of what I was told by injured workers are here included. Injured workers said:

‘...very cruel horrific system, worst experience of my life’ (‘Jessica’)

‘the case managers don’t have psychiatric qualifications, but it’s clear that they don’t require it when the insurer is more about profit and to reduce cost’ (‘Harry’)

2 Victorian Ombudsman, *Investigation into the Management of Complex Workers Compensation Claims and WorkSafe Oversight* (Report, September 2016) 156

3 Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers’ compensation claims* (Report, December 2019) 220 (‘Victorian Ombudsman 2019’).

4 Victorian Ombudsman 2019 (n 3) 219.

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'The feeling of being personally victimised, neglected, abused and made to feel powerless by a multi-national agent I had no choice but to trade with...leaves me without doubt that people have committed suicide as a result of the treatment meted out by agents (██████████)

'I got injured and treated like a criminal' ('Jason')

8 I conclude that, based on the evidence presented to the Ombudsman and to this Review, it is not an overstatement to say that the Victorian workers' compensation system is, in some cases, destroying lives. This situation has been allowed to continue for too long and must change.

9 Based on her extensive review of the evidence, the Ombudsman concluded that all five of WorkSafe's agents had, over a period of several years, acted in a manner that was:

- *unreasonable* by terminating or rejecting workers' entitlements without sufficient evidence; and issuing return to work non-compliance notices to workers in unreasonable circumstances; and
- *unjust* by failing to withdraw unsustainable decisions during conciliation; and conducting surveillance of injured workers without adequate justification.⁵

10 The Ombudsman made the following findings about WorkSafe's oversight of its agents and the extent to which it had been prepared to hold them to account for the way they managed complex claims:

WorkSafe has implemented a number of initiatives to improve workers' experience of the scheme since the 2016 investigation, and this work will continue with the delivery of the 2030 strategy. However, the investigation has shown that workers' experience of the scheme is most significantly affected by unreasonable decision making. WorkSafe appears reluctant to adequately deal with this when it is brought to their attention, based on its view that agents have delegated authority to manage claims and that conciliation and the courts are the appropriate mechanisms to ensure workers are appropriately compensated. It begs the question whether WorkSafe feels beholden to the agents, dependent on their participation to deliver a financially viable scheme.⁶

⁵ Victorian Ombudsman 2019 (n 3) 223. These findings were made under the *Ombudsman Act 1973* (Vic) s 23(1)(b).

⁶ Victorian Ombudsman 2019 (n 3) 222.

11 The Ombudsman’s two investigations of the management of complex workers’ compensation claims under the agent model left her in no doubt that the system was in need of fundamental reform:

After two investigations by the Ombudsman and several reviews commissioned by WorkSafe, *the evidence points to this being a systemic problem*. In too many complex claims, the system is failing to achieve one of the scheme’s objectives under the [Workplace Injury Rehabilitation and Compensation Act 2013], which is to ensure appropriate compensation be paid to injured workers ‘in the most social and economically appropriate manner, as expeditiously as possible’.⁷

12 After referring to evidence of emails in which agent staff were congratulated for terminating claims and others which ‘discussed the monetary value to the agent of terminating individual claims’, the Ombudsman concluded:

This evidence, when combined with the extent of continued unreasonable decision-making by agents on complex claims identified by this investigation, raises questions about the suitability of commercial organisations to manage these claims. As distinct from WorkSafe as the statutory authority charged with managing the scheme, agents have a vested interest in the outcome of individual claims arising from the commercial nature of their organisations, as well as the financial reward and penalty measures.⁸

13 The former Minister for Workplace Safety, the Hon Jill Hennessy MP, informed the Ombudsman that she was ‘disturbed by the findings’ of the report and that she shared the Ombudsman’s concern that ‘currently the workers compensation scheme is failing too many injured workers with complex claims’.⁹ The Minister committed to implementing the Ombudsman’s recommendation that the government commission an independent review of the agent model.

14 I am honoured to have been asked to conduct that Review which has been completed with the great assistance of counsel assisting, Ms Erin Hill, and a small team, expertly led by Dr Kirsten McKillop. I make 22 recommendations to improve the way complex claims are managed under the Victorian workers’ compensation system. The recommendations are aimed at maximising

7 Victorian Ombudsman 2019 (n 3) 219.

8 Victorian Ombudsman 2019 (n 3) 221.

9 Victorian Ombudsman 2019 (n 3) 240.

outcomes for injured workers while maintaining the financial viability of the system.

A paradigm shift to a more worker-centric scheme

- 15** Just as the Ombudsman concluded that there is a need for ‘wholesale change’ to the Victorian workers’ compensation system, so have I. The submissions and evidence I have received, and the consultations I have conducted as part of this Review, establish beyond doubt that there is a need for a paradigm shift to the system. Such a shift needs to result in a system that puts the injured worker at the centre and makes their recovery from injury the central focus of every aspect of the scheme.
- 16** A recent review of the workers’ compensation system of the Canadian province of British Columbia similarly recommended that its system needed to become more worker-centric.
- 17** The Petrie Report, as it is known, adopted a definition that captures what I have in mind. A ‘worker-centred approach’ is one which:
- ... takes into consideration the worker’s individual circumstances in applying policy and making decisions about benefit entitlement and rehabilitation measures. It is also designed to maximize the worker’s recovery from the injury or disease and to restore as close as possible the worker to his pre-injury employment status without a loss of earnings.¹⁰
- 18** That is not to say there are not other parties whose interests must be considered in the design and application of the scheme. To take an obvious example—employers, whose premiums fund the scheme and whose actions largely determine whether an injured worker can return to work—are critical stakeholders in the scheme.
- 19** Equally, the need for a more worker-centric scheme does not mean that the scheme’s financial viability is any less important. On the contrary: unless the scheme is financially viable, the interests of workers cannot be properly served.
- 20** The WorkSafe scheme needs re-balancing. For too long financial sustainability has been prioritised over the health of individual workers. As a submission to the Review eloquently expressed it:

¹⁰ Paul Petrie, *Restoring Balance: A Worker-Centred Approach to Workers’ Compensation Policy* (Report, 31 March 2018) 10.

...the return to work and health objectives of the compensation scheme are its primary objectives, with financial sustainability an important enabling concept but not the primary focus of scheme activities.¹¹

21 Further, I accept that it is inherent in a workers' compensation scheme, that claims for entitlements must be assessed and evaluated rigorously. The more individualised, worker-centric claims management processes that I recommend should be implemented does not mean that all claims must be unquestioningly accepted. Rather, as a consultant explained in its recent review of the New South Wales compensation system's claims management processes:

'Best practice case management ensures that validly injured workers receive the support they require yet also applies a challenging mindset to questionable claims, ensures factual investigations are thoroughly carried out and applies the necessary scrutiny to proposed medical decisions and procedures.'¹²

A consultative review conducted during a pandemic

22 To gain an understanding of the impact of the WorkSafe system, I considered it important to consult with as many injured workers as time and circumstances allowed. Because the Review was conducted during the second half of 2020 when Melbourne was either entirely or partially locked down, all consultations had to be virtual and with either small groups or individual workers. My preference would have been to hold some public forums at which workers and their family members could share their experiences. This is a process that has worked well in other inquiries such as the Victorian Bush-Fires Royal Commission (2009) and the Royal Commission into Aged Care Quality and Safety (2021).

23 The Review was conducted at the behest of the Minister for Workplace Safety. It was not established under the *Inquiries Act 2014 (Vic)*. I had no power to compel witnesses to provide me with documents or to attend public hearings. This had two implications.

24 The first was that I was heavily reliant on the voluntary co-operation of those with whom I consulted. Fortunately, I experienced a high degree of co-operation. People with direct experience of the scheme, employer organisations, trade unions, legal, vocational rehabilitation and medical practitioners and independent researchers all gave generously of their time to

11 Submission DP36 (IWHG Monash) 7.

12 EY, *Compliance and Performance Review of the Nominal Insurer, Part 1: Claims Management* (Report, December 2019) 5.

help me understand the challenges faced by the system and the options for reform. The passion that people in Victoria have for the subject of workplace safety has not diminished since Chris Maxwell QC, as he then was, remarked about it when conducting his review of workplace safety law nearly twenty years ago.¹³

- 25** The second implication of my lack of coercive powers was that it meant I was reliant on the investigations conducted and the findings made by the Ombudsman in her two WorkSafe reviews. As noted, my own research and other relevant inquiries summarised in this Report have corroborated the evidence and findings in the two reports. That being the case, I had no reason to question those findings.

The structure of this Report

- 26** The Report is presented in three parts. Part A, consisting of Chapters 1-5, is provided by way of contextual background. Part B, which comprises Chapters 6 and 7, summarises the submissions made to the Review and the published research. Finally, Chapters 8-12 in Part C address the specific questions posed for the Review by the Terms of Reference.

Part A – Background and context

- 27** In **Chapter 1**, I summarise the Terms of Reference for the Review and describe the way in which the Review was conducted. As noted, the Review has been conducted against the background of two reports by the Ombudsman and is in fact the product of one of the recommendations in the second of those reports.
- 28** Chapter 1 also details the processes that have been followed to gather evidence. There were 44 consultations with interested groups, individuals and organisations. I received 62 written submissions in response to a discussion paper and 17 written submissions in response to an options paper. The Review team brought together a group of academics, medical practitioners and researchers into an expert panel. I held two virtual consultations with that panel and its members provided several written submissions to the Review.

¹³ Chris Maxwell, *Occupational Health and Safety Review* (Final Report, March 2004) 16.

- 29** The Review website made an online survey available to the public and 72 people, the majority of whom were injured workers, completed the survey anonymously and shared their experiences of the system.
- 30** I wish to record my gratitude to all of the people with whom I consulted for sharing their experiences and expertise about workers' compensation generally and the Victorian workers' compensation system in particular. I particularly acknowledge the courage of the injured workers who shared what were often very harrowing experiences of the scheme with the Review.
- 31** In **Chapter 2**, I examine the history of the Victorian workers' compensation system concentrating on the period since 1985 when the previous private insurance system was replaced by the centrally funded 'WorkCare' scheme. As noted above, WorkCare was a hybrid public-private scheme from its birth as a result of a political compromise by the government of the day.
- 32** The scheme has been through many changes in the ensuing 36 years including some 're-badging'—as 'WorkCover' in 1992 and then as 'WorkSafe' in 2001.
- 33** Key features of the scheme such as benefit levels, thresholds for entitlements and the dispute resolution processes have regularly changed but the so-called 'agent model' has endured somewhat against the odds.
- 34** In **Chapter 3**, I describe the current complex legislative structure of the scheme under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('WIRC Act'). I describe the basic entitlements conferred by the Act and the processes that must be followed by workers, employers and WorkSafe.
- 35** The complex provisions governing entitlements to compensation for mental injuries are summarised as are the tests that must be applied to determine if a worker can continue to receive weekly payments of compensation beyond 130 weeks. These somewhat contentious aspects of the scheme play an important role in complex claims and are in fact the cause of some of the complexity.
- 36** There have been important recent changes to the scheme such as the introduction of 'provisional payments' for workers suffering mental injuries. The chapter also examines the life of a claim with a focus on the return-to-work obligations under the WIRC Act and the processes available to resolve disputes about entitlements.
- 37** In **Chapter 4**, I explain how the Victorian workers' compensation scheme is currently administered. The Victorian WorkCover Authority (known as

‘WorkSafe’) has the statutory responsibility to manage the scheme as effectively, efficiently and economically as possible and to 'ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as expeditiously as possible'.¹⁴

- 38** WorkSafe is empowered, but not required, to authorise agents to act on its behalf in managing the scheme.¹⁵ As with other aspects of the scheme, the approach WorkSafe has taken to overseeing the conduct of its agents has varied over the life of the scheme.
- 39** In 2016, WorkSafe authorised five agents for a period of five years to act on its behalf in relation to the administration of insurance and the management of claims for compensation. Each agent performs these functions pursuant to terms and conditions in a template ‘agency agreement’.
- 40** Chapter 4 examines those terms and conditions including the system of financial incentives and penalties that WorkSafe applies to encourage certain agent behaviours and discourage others.
- 41** In the most recent financial year (2019-20), WorkSafe paid its agents \$263 million. In addition, WorkSafe expended a further \$125 million on ‘insurance and claims management’ and \$61 million on ‘dispute resolution’.¹⁶
- 42** In **Chapter 5**, I discuss the eight previous reviews that have been conducted during the last twenty years which have examined WorkSafe’s management of claims under the agent model. Five of these reviews have been carried out by independent State government oversight agencies – three by the Victorian Ombudsman and two by the Victorian Auditor-General. A further three have been commissioned by WorkSafe itself and have been carried out by private consultancies.
- 43** To varying degrees, they have all called into question how well WorkSafe’s agents are managing workers’ compensation claims. A number have examined the management of claims which are ‘complex’ in the sense that the claimants are in the system for long durations because of the nature of their injuries or other features of their claims. The two most recent of the reports, by the

¹⁴ *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 492 (‘WIRC Act’).

¹⁵ WIRC Act s 500.

¹⁶ WorkSafe Victoria, *Annual Report 2019-20* (Report, 2020) 51.

Ombudsman, include highly distressing accounts of the human toll that the system takes on some injured workers.

- 44** The various reports have also raised concerns with how WorkSafe holds its agents to account to ensure that the needs of injured workers are met while maintaining the financial integrity of the scheme.
- 45** As long ago as 2009, the Auditor-General concluded that WorkSafe’s ‘agents are not remunerated on the basis of their performance against quality measures linked directly to good practice in case management’.¹⁷
- 46** More recently, the Ombudsman found in her reports that some of WorkSafe’s financial incentives rewarded inappropriate agent behaviours such as rejecting and terminating claims rather than making sustainable and evidence-based decisions. In response to those criticisms, WorkSafe has amended its system of incentives and penalties. WorkSafe is to be commended for this. However, as those changes have been implemented very recently, it has not been possible to assess their effectiveness.

Part B – Submissions and research

- 47** In **Chapter 6**, I discuss what features of a workers’ compensation claim make it ‘complex’. The Terms of Reference define a ‘complex claim’ as one where the injured worker has received weekly payments of compensation for more than 130 weeks.
- 48** However, a theme running through many submissions to the Review has been that this is an inadequate definition because, while many if not all of such claims are complex, there are numerous others that should be managed as ‘complex’ well before they reach 130 weeks. As one submission put it, the definition of 130 weeks ‘captures the outcomes of complexity, but not the journey that injured workers take as their claims become complex’.¹⁸

¹⁷ Victorian Auditor-General's Office, *Claims Management by the Victorian WorkCover Authority* (Audit Report, June 2009) 61 ('VAGO 2009'). The Ombudsman referred to this finding in her 2016 Report: Victorian Ombudsman, *Investigation into the Management of Complex Workers Compensation Claims and WorkSafe Oversight* (Report, September 2016) 20-21, 122-123 ('Victorian Ombudsman 2016'). The Ombudsman noted that ‘despite VAGO’s comments that a new quality measure was needed to link outcomes in relation to termination decisions with good practice case management, WorkSafe did not introduce such a reward for five years’: Victorian Ombudsman 2016 (n 2) 123.

¹⁸ Submission DP1 (ACCS) 2.

- 49** Submissions to the Review and the published research point to a number of features of workers' compensation claims that often lead to them becoming complex. These features include the nature of the injury (especially if it is a mental injury), the length of the period of incapacity, the attitude of the employer, whether there are delays in decision making and how the claim is managed.
- 50** The Australian Psychological Society suggested that the term 'complex claim' is 'a euphemism for injuries involving a primary or secondary psychological injury associated with stress or traumatic stress'.¹⁹ There can be no doubt that many complex claims involve mental injuries.
- 51** Importantly for this Review, many submissions and workers who completed the survey pointed out that an otherwise straightforward claim can become complex by virtue of how the claim is managed. Submissions referred to the impact of inadequately trained case managers and the high turnover of managers as examples.
- 52** WorkSafe informed the Review that the proportion of mental injury claims is 17 per cent of total claims and is increasing.²⁰ Mental injury claims on average receive compensation payments nearly two and a half times higher than claims generally, and the duration of time off work by a worker with a mental injury claim is nearly three times greater.²¹
- 53** Correspondingly, workers suffering from a workplace mental injury require more care and more time away from work. In 2018, Safe Work Australia estimated that, in 2013-14, the median time lost and the median compensation paid for serious claims for mental disorders was, in each case, more than double the median time lost and cost of all claims.²²
- 54** International and Australian research establishes that assessment of complexity should happen promptly after a claim is submitted to maximise the opportunity

19 Submission DP14 (APS) 2.

20 Submission DP57 (WorkSafe).

21 Safe Work Australia data from 2010-11 to 2014-15 indicates average compensation paid on mental injury claims was \$24,500 compared to \$9000 for all claims; and average time lost was 15.3 weeks compared to 5.5 weeks for all claims. Safe Work Australia, 'Mental Health' (Web Page) <<https://www.safeworkaustralia.gov.au/topic/mental-health#snapshot-of-claims-for-mental-health>>.

22 SuperFriend and Safe Work Australia, *Taking Action: A Best Practice Framework for the Management of Psychological Claims in the Australian Workers' Compensation Sector* (Report, 2018) 9.

to arrange interventions to assist the recovery of the worker. A balance must be struck between how promptly the assessment can be made and having enough information about the claim to avoid false positives. It is important that a ‘biopsychosocial’ model is used rather than the purely ‘biomedical’ model which presently prevails. Best practice suggests that assessment for features of complexity should occur within 6 to 12 weeks of the claim being lodged.

- 55** In **Chapter 7**, I examine both how complex claims as identified in Chapter 6 are currently being managed, and what submissions and published research say about how they should be managed. I conclude that, when current practice is measured against international and Australian best practice, the former is found wanting.
- 56** In accordance with the Terms of Reference, I reviewed other Australian and international schemes. The schemes discussed in Chapter 7 were identified in submissions and consultations as high performers. They include the Victorian Transport Accident Commission, the Queensland workers’ compensation scheme, the New Zealand Accident Compensation Corporation and the workers’ compensation systems in the Canadian province of British Columbia and the State of Washington, United States. I am grateful to the officers of those various schemes with whom the Review consulted.
- 57** These schemes share a number of features with the WorkSafe scheme but none of them uses agents to manage claims in the way that occurs in Victoria. They all manage complex claims in a more worker-centric manner than occurs presently in Victoria. I conclude that there will be much that WorkSafe can learn from the way these schemes operate as it takes on more of a direct role in the management of complex claims. However, as all schemes are different, WorkSafe must develop a complex claims management approach that is tailored to the scheme it runs.
- 58** I note that WorkSafe and its agents have been trialling some innovative methods to identify and manage complex claims. These seek to use a biopsychosocial approach which gives primacy to the individual needs of the claimants. This is a positive development. It should be possible for WorkSafe to draw on this experience in future.

Part C – Terms of Reference

- 59** In **Chapter 8**, I address paragraph 11 of the Terms of Reference which calls for an assessment of the suitability, adequacy and effectiveness of the outsourced agent model in the administration of complex claims under the WIRC Act.
- 60** While there are some examples of high-quality case management in the Victorian workers' compensation scheme, and there are many case managers who are doing their very best to address the individual needs of claimants, the features of best practice case management identified in Chapters 6 and 7 are not evident at a systemic level. While there is some segmenting of claims, it is not done in a way that reflects the individual needs of the workers.
- 61** WorkSafe has implemented a number of changes to its oversight arrangements in response to the recommendations in the Ombudsman's two reports. Most significantly, there have been important changes to its system of financial incentives.
- 62** However, as noted above, it is difficult to express a view about the effectiveness of current oversight arrangements with any confidence because data about the effects of these very recent changes to the incentives is not available. As with other changes to oversight arrangements, there is insufficient evidence upon which to express a firm view about their effect. Having said that, the continued high number of complaints about the scheme received by the Ombudsman since her 2019 report was published is cause for concern.
- 63** The evidence in this Review suggests that there is a high degree of interest in the financial incentives WorkSafe offers its agents. I have heard repeatedly that it is not easy to find out what those incentives are and how they are applied. There is no legitimate reason for secrecy in relation to this matter. I consider it is important that WorkSafe be more transparent in this regard.
- 64** Recommendations 1 and 2 are aimed at increasing the level of transparency around the financial incentives.

Recommendation 1: Transparency about agents' incentives

WorkSafe should publish on its website a plain English explanation of the financial incentives and penalties it offers its agents. This should include:

- what the purpose of each incentive/penalty is; and
- what incentives are paid or penalties imposed in each year and the reasons for these.

Recommendation 2: Monitoring agent behaviour

The WorkSafe Reform Implementation Monitor should monitor and publicly report upon the effect of the changes to the financial incentives on agent behaviour.

- 65** I conclude in response to the question I am asked in paragraph 11 of the Terms of Reference that the administration and management of complex claims under the outsourced agent model is unsuitable, inadequate and ineffective. This is because complex claims administration and management by WorkSafe’s agents under current arrangements are not maximising outcomes for injured workers.
- 66** The agent model has not been maximising outcomes for injured workers for a number of years, as demonstrated by the conclusions of the independent reviews discussed in Chapter 5.
- 67** In fact, in far too many cases the opposite is the case: the way a significant number of claims are managed, especially those involving mental injuries, is inhibiting the recovery of the workers involved.
- 68** In light of these findings, I have concluded that there is a need to fundamentally change the way complex workers’ compensation claims are managed in Victoria. I agree with the Ombudsman’s assessment that ‘it is time for the change that makes a difference’.²³
- 69** In **Chapter 9**, I build on the findings in Chapter 8 about the inadequacy of the agent model to deal with the real needs of injured workers with claims that are complex or at risk of becoming complex.
- 70** I conclude that there needs to be reform to both the way compensation claims are categorised (or triaged) and the way they are subsequently managed in

²³ Victorian Ombudsman 2019 (n 3) 5.

accordance with the best practice principles explained in Chapters 6 and 7 respectively.

71 I released an options paper for targeted consultation in December 2020. The paper canvassed seven options for reform.²⁴ They included maintaining the status quo (Option 1); reform of the agent model (Options 2 and 6); partial replacement of the agent model (Options 4 and 5); and the removal of agents from the scheme entirely (Option 7). I received a range of responses to the options from interested parties. I was not informed of any other options beyond the seven identified in the options paper.

72 I have carefully considered the responses in light of all of the evidence and concluded that WorkSafe should triage and manage complex claims directly leaving its agents to manage the remaining claims (Option 5). I have reached this conclusion for three principal reasons.

73 The **first** is that, among the available options, it is the most likely to address the root causes of the problems with complex claims management identified by the Ombudsman. A number of submissions identified those root causes as being:

- (1) the agents are ‘for profit’ entities with a primary focus on making money and expecting them to implement a person-centred individualised approach to claims management is unrealistic because it is unlikely to maximise their returns; and
- (2) the inability or unwillingness of WorkSafe, over a lengthy period, to require its agents to administer the scheme in a way that maximises the interests of injured workers with complex claims.

74 The **second** reason is that, of the available options, Option 5 carries the least risk. While the agents have argued with conviction that they can mend their ways, I am unwilling to give them another chance to manage complex claims in light of their past records. As a joint submission by members of the Review's expert panel put it:

...there have been multiple unsuccessful attempts to improve claims management within the claims agent model'.²⁵

75 However, just as there are risks of retaining agents as the managers of complex claims, there are also risks of removing them entirely and having WorkSafe as

²⁴ The Options Paper is reproduced at Appendix F.

²⁵ Submission OP7 (Expert academic and medical group) 8.

the manager of all claims: complex and simple (Option 7). WorkSafe managing all claims, at least in the short or medium term, is not feasible on the evidence before me.

76 The **third** reason is related to the first and second. It relates to a phenomenon that economists describe as the ‘principal-agent problem’. In short, the historical record concerning the relationship between WorkSafe and its agents suggests that all too often the ‘tail wags the dog’ rather than the other way around. As the Ombudsman put it, WorkSafe appears to be ‘ beholden to the agents’. The successful implementation of Option 2, which would see the agents managing complex claims, would require a fundamental shift in this power imbalance. On the evidence before me, I think this is unlikely.

How will the new system work?

77 In Chapter 9, I recommend that WorkSafe should establish a Complex Claims Unit which will be the administrative division of WorkSafe that is responsible for identifying and managing complex claims. WorkSafe will need to build on the work it and its agents have been doing to implement a state-of-the-art process for identifying complex claims taking into account the learning summarised in Chapter 6 of this Report and other research that WorkSafe considers appropriate.

78 In its response to the discussion paper in September 2020, WorkSafe informed me that it would require at least 18 months to enable workforce planning, recruitment and training of staff to be able to manage complex claims in-house. I note that since that time, WorkSafe’s Board has decided that WorkSafe should assume direct responsibility, with effect from 31 May 2021, for 539 complex claims currently being managed by one of its agents, CGU. It has recently recruited a workforce to do this. I have taken this development into account in the recommendations that I have made in this chapter.

79 I have no doubt that WorkSafe currently employs many capable employees who are highly experienced in relation to workers’ compensation. It has started to augment its existing workforce to prepare for the CGU claims for which it will soon assume responsibility. It will need to continue this process so that it is positioned to assume full responsibility for identifying and managing all complex claims by 1 January 2023.

Recommendation 3: Claims to be provided by employers to WorkSafe

The Minister for Workplace Safety should amend the Claim for Compensation Ministerial Guidelines 2016 to require that employers provide claims to WorkSafe and not to WorkSafe's agents. This should take effect from 1 January 2023.

- 80** The experience of the New South Wales icare reforms in recent years has emphasised the importance of not taking a 'set and forget' approach to the identification of complex claims. Under the system that I am recommending, approximately 80% of claims will continue to be managed by WorkSafe's agents. These will be the claims WorkSafe assesses as not having the features of complexity that are described in Chapter 7.
- 81** However, it is important that those claims be monitored by the agents to determine if they are showing signs of complexity. For example, the development of a secondary mental injury will usually suggest that a claim is at risk of becoming complex.
- 82** This assessment should be carried out using the same methodology developed by WorkSafe in response to Recommendation 4 and by staff approved for that purpose by WorkSafe. This will ensure a consistent approach across all agents to this important task.

Recommendation 4: WorkSafe to identify if claims are complex or at risk of becoming complex

WorkSafe should implement a triage system to assess if a claim it receives is complex or at risk of becoming complex.

In this recommendation, 'complex' means that there are risk factors associated with a worker's claim that make a delayed return to work by the worker likely if those factors are not addressed.

Claims should be assessed using a biopsychosocial approach based on the individual needs of the worker and not just the likely duration of the claim.

The goal of the triage system should be to gather sufficient information about the claim to assess relevant risks. Wherever possible, this should occur within six weeks of the date of the injury. While the system may incorporate some form of automated algorithm, it should also incorporate the 'human touch'.

The triage system implemented by WorkSafe should be based on the most up to date research including the 'Best Practice Statement: Risk Factor Identification for Delayed Return to Work' published by the Insurance Work and Health Group, Monash University (April 2018).

Recommendation 5: Non-complex claims to be transferred to one of WorkSafe's agents

A claim that WorkSafe assesses as not complex and not at risk of becoming complex should be transferred to an agent for management.

Recommendation 6: Agents to assess for complexity every 13 weeks

A claim transferred to agents as non-complex should be reassessed by the agent if the claim is still open after 13 weeks. The agent should assess if the claim has become complex or is at risk of becoming complex. The same assessment should be made every 13 weeks while the claim remains open.

This assessment should be made using the same methodology developed by WorkSafe to assess claims for complexity (Recommendation 4) and by agent staff approved by WorkSafe to make such assessments.

Any claim that is assessed as being complex or at risk of becoming complex is to be transferred forthwith back to WorkSafe for its management.

Recommendation 7: WorkSafe to establish a Complex Claims Unit

WorkSafe should establish a Complex Claims Unit by 1 January 2022 to manage claims that it assesses are complex or at risk of becoming complex.

The Complex Claims Unit should manage claims having regard to the individual needs of the worker and using a biopsychosocial approach.

The goals of the Complex Claim Unit will be to:

- pro-actively identify appropriate and timely interventions for the claim to maximise the prospects of the worker being restored to their pre-injury lifestyle, including employment;
- ensure that those interventions are implemented for as long as the claim is open;
- pro-actively communicate with the worker, treating health providers, the employer and any other relevant parties; and
- ensure the claim is otherwise administered in accordance with the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)*.

Recommendation 8: Staffing the Complex Claims Unit

WorkSafe should staff its Complex Claims Unit with appropriately qualified, trained and experienced staff. In establishing the Complex Claims Unit, WorkSafe should:

- create job descriptions that promote the recruitment of appropriately skilled staff with a person-centred, culturally competent approach;
- determine appropriate team and managerial structures;
- develop a broader recruitment strategy; and
- develop best practice training, coaching, mentoring and performance management for staff.

83 In **Chapter 10**, I respond to paragraph 17 of the Terms of Reference which requires me to make recommendations to give effect to any improvements I consider are needed to the policy, legislative or regulatory framework.

84 I make 12 recommendations in this chapter in relation to the following topics:

- Continuous improvement of the scheme;
- Enhancing worker involvement;
- Responding to feedback and complaints;
- Surveillance of injured workers;
- The employment obligation period;
- The training of return to work co-ordinators;
- WorkSafe’s return to work role; and
- The objectives of the scheme.

Continuous improvement of the scheme

85 It should not take a crisis for there to be a review of the operation of a scheme as important as the WorkSafe scheme. In other cognate schemes, there is a statutory requirement for periodic reviews. This accords with best practice. Under section 490 of the WIRC Act, there is a requirement for a review every five years of the setting of premiums under Part 10 of the WIRC Act. The intent of Recommendation 9 is to expand the scope of that review to the entire operation of the scheme.

86 Given the number of changes recommended in this Review, it is important that the first periodic review take place by 1 July 2024. Subsequent reviews can be conducted at five yearly intervals thereafter. In this Report, a number of matters that should be considered by the first review are identified.

Recommendation 9: Regular statutory reviews of the scheme

The *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* should be amended to mandate a review on the operation of the scheme to be completed by 1 July 2024 and thereafter at least once every five years. The Minister should table each report in Parliament and a copy should be published on WorkSafe’s website.

Enhancing worker involvement: an improved feedback process

- 87** One of the themes that has emerged from the consultations and submissions is that injured workers do not believe that their voices are heard by WorkSafe and its agents. Feedback from injured workers about their experience of the scheme is a valuable source of intelligence for WorkSafe. That feedback should be used strategically to improve the operation of the scheme. I have been impressed with how this is done by New Zealand's Accident Compensation scheme through the 'Heartbeat' process which is described in Chapter 7.
- 88** The Ombudsman's reports record the significant number of complaints about WorkSafe that her office receives. That workers are complaining to the Ombudsman suggests that the existing processes for WorkSafe to receive and resolve complaints is not working appropriately.
- 89** Recommendation 10 is aimed at ensuring that the voice of workers, employers and others are heard and that their feedback (both negative and positive) leads to the continuous improvement of the scheme.

Recommendation 10: Improved feedback procedure

WorkSafe should introduce a mechanism which enables the following parties to provide feedback about WorkSafe and its agents:

- a) Workers, their family members and/or representatives
- b) Employers
- c) Providers of services, including, but not limited to, medical practitioners, allied health professionals, rehabilitation services.

The feedback mechanism should allow frontline staff of WorkSafe and its agents to receive and act on real time feedback obtained through a) – c).

The feedback should be used to identify and respond to systemic issues within the scheme. This systemic information should be shared with:

- a) The WorkSafe Reform Implementation Monitor; and
- b) The expanded Workplace Incidents Consultative Committee

The development of this feedback mechanism should be informed by the best practice approach of 'Heartbeat' used by the Accident Compensation Corporation in New Zealand, in combination with existing approaches used by WorkSafe to conduct 'health checks' on claims.

This should occur by 1 January 2023.

Improving the advice provided to the Minister and WorkSafe

- 90** The establishment of the Workplace Incidents Consultative Committee in 2020 under the *Occupational Health and Safety Act 2004* (Vic) was a commendable step by the government. It gives a voice in the policy-making process to those most directly affected by workplace injury, illness and death.
- 91** At the moment, the remit of the Committee is limited to providing advice and making recommendations to the Minister about improvements to policies ‘relating to occupational health and safety’. While it is arguable that the Committee’s current role extends to policies relating to compensation and rehabilitation, I consider that this should be put beyond doubt by a simple amendment to the *Occupational Health and Safety Act 2004*. Recommendation 11 is directed to achieving that outcome.

Recommendation 11: Expand the remit of the Workplace Incidents Consultative Committee

The government should expand the remit of the Workplace Incidents Consultative Committee. The expanded remit should include providing advice and making recommendations to the Minister about the development, review and improvement of policies, practices, strategies and systems relating to workers’ compensation and the rehabilitation of injured workers. This could be achieved by amending section 126A(2) of the *Occupational Health and Safety Act 2004* (Vic).

- 92** Information about the membership and operations of the three WorkSafe statutory advisory committees should be publicly available as is the case in comparable compensation schemes such as the New Zealand scheme. Unless there is a good reason to preserve privacy or other sensitive information, minutes of the meetings should be posted on WorkSafe’s website. At present, only the most basic information about the committees is included in WorkSafe’s annual reports.
- 93** Recommendation 12 is aimed at achieving greater transparency around the operation of these important committees.
- 94** With the establishment of the Workplace Incidents Consultative Committee, there are now three WorkSafe advisory bodies with overlapping memberships and terms of reference. The WorkCover Advisory Committee was established in

1992 and the Occupational Health and Safety Advisory Committee in 2004. Their operations have never been formally reviewed.

- 95** The operation of the regulations which detail the operations of the Workplace Incidents Consultative Committee must be reviewed within two years of the appointment of its inaugural members. I consider that review should extend more broadly to the operation of the various WorkSafe committees with a view to improving their overall efficiency.

Recommendation 12: Greater transparency by WorkSafe

WorkSafe should amend its website to include up-to-date information about the membership and the minutes of meetings (redacted if necessary to preserve privacy or for other legitimate reasons) of:

- the WorkCover Advisory Committee;
- the Occupational Health and Safety Advisory Committee; and
- the Workplace Incidents Consultative Committee.

Recommendation 13: Future role of WorkSafe's advisory committees

The scope of the review of the Workplace Incidents Consultative Committee under regulation 5530 of the *Occupational Health and Safety Regulations 2017* (Vic) should be expanded to consider the operation and potential rationalisation of the Workplace Incidents Consultative Committee, the WorkCover Advisory Committee and the Occupational Health and Safety Advisory Committee.

To ensure that the amended regulation is within power, it should be made under the regulation-making power in the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) as well as the regulation-making power in the *Occupational Health and Safety Act 2004* (Vic).

Workers should be treated with dignity and respect

- 96** Section 11 of the WIRC Act lists the rights and obligations of workers under the Act. There are two rights and three obligations. The rights are to receive 'appropriate compensation' and to be given 'information relevant to a claim'.

- 97** In contrast to other compensation schemes such as those operating in New Zealand and South Australia, an injured worker in Victoria is not entitled to be treated respectfully and with dignity by those charged with managing the scheme. The evidence before the Ombudsman and this Review suggests that this is no small omission.
- 98** Recommendations 14, 19 and 20 are aimed at ensuring that workers are entitled to be treated with dignity and respect and that WorkSafe, and anyone acting on its behalf, have a corresponding responsibility.

Recommendation 14: A Code of Injured Workers' Rights

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to require WorkSafe to develop and publish on its website a Code of Injured Workers' Rights. This should be prepared in consultation with the WorkCover Advisory Committee, the Workplace Incidents Consultative Committee and any other people nominated by the Minister for Workplace Safety.

The Code should identify the rights of workers and the corresponding responsibilities of WorkSafe, as well as the process by which rights may be enforced.

In developing the Code, WorkSafe should consider other examples including the New Zealand 'Code of ACC Claimants' Rights'.

Recommendation 19: WorkSafe to treat workers with dignity and respect

Section 492 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended by adding after paragraph (c):

Ensure that workers who suffer injuries at work receive high-quality service and are treated with dignity and respect.

Recommendation 20: Amend the objectives of the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)

Section 10 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended by the addition of the following objectives:

- To ensure that injured workers or dependants are treated fairly by WorkSafe; and
- To ensure that workers who suffer injuries at work receive high-quality service and are treated with dignity and respect.

Improving Return to Work

99 Employers have extensive obligations in relation to returning their injured employees to work under Part 4 of the WIRC Act. One of those obligations is to appoint an ‘appropriate person’ as the employer’s ‘return to work coordinator’. A person will be ‘appropriate’ for this purpose if they have an ‘appropriate level of seniority’ and are ‘competent’ to assist their employer to meet its obligations under Part 4.

100 However, unlike the position under some interstate schemes, there is no requirement under the WIRC Act for a return to work co-ordinator to be appropriately trained. The absence of such a requirement has been noted by inquiries dating back to 1997. Given the importance of the role, that is incongruous. I consider that a properly trained return to work coordinator will be equipped to assist their employer to meet its obligations not just under the WIRC Act but also under the *Equal Opportunity Act 2010* (Vic) and the *Disability Discrimination Act 1992* (Cth) each of which require an employer to take positive steps to accommodate its injured workers.

101 Recommendation 17 addresses this gap in Part 4 of the regulatory scheme.

Recommendation 17: Return to work co-ordinators should be trained

Section 106 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to impose a duty on an employer to:

- provide a return to work co-ordinator with the assistance and facilities reasonably necessary for the return to work co-ordinator to perform their functions under the Act;
- ensure that a return to work co-ordinator has received such training as is determined by WorkSafe and published from time to time on its website.

102 Another of an employer's important obligations under Part 4 of the WIRC Act is to provide employment to an injured worker, to the extent that it is reasonable to do so, until the expiration of the 'employment obligation period'. That period is an aggregate period of 52 weeks usually commencing when the employer receives a claim for compensation from the worker. The evidence is that the employment of many workers is terminated by their employers when the period expires making it very difficult for those workers to return to work.

103 Workers with complex claims will often receive compensation under the WIRC Act for periods that exceed 52 weeks. Submissions to the Review have stated that some of these workers would benefit from the employment obligation period being extended. A number of submissions from trade unions suggested that the period should be extended so that it corresponds to the life of the claim or at least to the end of the 'second entitlement period' which is 130 weeks.

104 The evidence does not support an across-the-board extension. It is an imposition on an employer to hold a job open.

105 However, I accept that there are some cases where the benefit to the worker (and the scheme as a whole) will justify an increase in the imposition on an employer. I consider that the matter is best addressed on a case-by-case basis. Recommendation 16 is aimed at establishing a mechanism to achieve this.

Recommendation 16: Employers' return to work obligations— extending the employment obligation period

Part 4 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to enable a worker with an incapacity for work to apply to WorkSafe for an extension of the 'employment obligation period' applying to the worker's employer. Any such application would need to be supported by evidence of the benefits that would flow to the worker from the extension being

granted. An application must be made at least 60 days before the expiration of the employment obligation period.

Upon receipt of an application, WorkSafe must consult with the worker, the worker's employer and anyone else it considers appropriate. It must grant the application for the period it considers appropriate if it is satisfied that the worker's prospects of returning to work would materially improve from the extension. The employment obligation period in a particular case must not exceed an aggregate period of 130 weeks.

WorkSafe should have a greater role in the return to work process

- 106** It is vital for injured workers, the scheme and the community generally that everything possible be done to return them to work in a sustainable manner and when they are ready. Employers and workers have extensive return to work obligations under Part 4 of the WIRC Act.
- 107** However, WorkSafe's role is limited to that of an independent umpire to ensure that employers and workers follow the rules. While this is clearly an important role, WorkSafe can and should do more. It should be an active participant in the return to work process. This is the case in cognate schemes such as that operating in South Australia and the State of Washington, USA.
- 108** Recommendation 18 is aimed at ensuring that WorkSafe actively manages claims to promote improved recovery and return to work outcomes. This more active role will complement WorkSafe's role as the direct manager of complex claims.

Recommendation 18: WorkSafe to actively manage claims

Section 97 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended by adding before paragraph (a):

That WorkSafe actively manage all aspects of a worker's injury and any claim under this Act by ensuring timely intervention occurs to improve recovery and return to work outcomes.

Better regulation of the surveillance of workers

- 109** Many of the workers to whom the Review spoke complained bitterly about being put under surveillance by WorkSafe’s agents. This was also a matter of great concern to the Ombudsman who made two recommendations to WorkSafe about the topic. A number of injured workers said that being the object of surveillance made them feel like criminals and undermined their confidence and dignity.
- 110** I accept that stamping out fraud on the workers' compensation scheme is a legitimate function of WorkSafe and its agents. What is not clear is the extent to which surveillance of injured workers reduces the level of fraud. This is another example of how greater transparency around the WorkSafe system would improve the public’s understanding of its operations.
- 111** It is difficult to assess the extent to which the Ombudsman’s recommendations about surveillance have been effective because of the impact of the pandemic.
- 112** I am concerned that it remains too easy for a worker to be put under surveillance. The intent of Recommendation 15 is to make it as difficult for a worker to be put under surveillance as it is for a search warrant to be obtained. Given the intrusion of surveillance into the lives of workers, this is appropriate. Surveillance will still be available in legitimate cases to investigate suspected fraud. There will be more information available about surveillance.

Recommendation 15: WorkSafe to control when surveillance can be used on workers

An agent that wants to conduct surveillance on a worker should be required to apply to WorkSafe for permission. Any such application should be supported by evidence that grounds the agent’s ‘reasonable suspicion’ that the use of surveillance is necessary. Permission should only be granted where WorkSafe is satisfied that there are reasonable grounds for conducting the proposed surveillance and there is no less invasive method of investigation which would adequately address the agent’s concerns. The permission should identify the type of surveillance authorised and the duration for which it is authorised.

In its annual report, WorkSafe should report on:

- the number of applications made for surveillance;
- the number of those applications approved or denied; and

- the number of instances where the use of surveillance was relied on to reject or support claims made.

- 113** As the 2018 Peetz Review of the Queensland workers' compensation system concluded, 'it is essential that the workers' compensation system maintain pace with developments in the labour market and the economy'.²⁶ To this I would add that the system must adapt to events in society more generally such as the COVID-19 pandemic.
- 114** In **Chapter 11**, I examine the financial health of the scheme and the impact of the recommendations of the Review. The chapter also responds to paragraph 16(c) of the Terms of Reference by identifying three emerging risks to the scheme.
- 115** At my request, WorkSafe provided the Review with financial costings it had prepared for the implementation of Options 4, 5 and 7 in the options paper. WorkSafe made its own assumptions about the implementation of these options and they are detailed in Chapter 11.
- 116** Broadly speaking, WorkSafe has assumed that, in the implementation of Option 5 (under which WorkSafe would triage and manage complex claims), it would manage approximately 20% of all claims and that this would constitute approximately 50% of total claims management because such claims are more resource intensive.
- 117** WorkSafe estimates that it would need to employ 820 additional claims staff to implement my preferred option which, as noted above, is Option 5. It estimates that it will cost approximately \$495 million spread over five years to implement Option 5 including \$50 million on staff, \$55 million on premises and \$205 million on changes to its method of service delivery as well as other costs including an amount for contingencies of \$80 million.
- 118** WorkSafe also estimates its ongoing additional annual operating costs to be between \$20 million and \$50 million.

²⁶ David Peetz, *The Operation of the Queensland Workers' Compensation Scheme: Report of the Second Five-Yearly Review of the Scheme* (Report, 27 May 2018) xxvii.

- 119 [REDACTED]
- 120 Turning to the emerging risks to the scheme, the first risk discussed in Chapter 11 is the financial challenge posed by the pandemic. The most recent WorkSafe annual report records that in 2019-20 WorkSafe experienced a deficit of \$3.5 billion which was \$3.4 billion below target. This is clearly a major challenge to the financial viability of the scheme. How quickly WorkSafe can recover from this financial position will depend on the broader investment environment. However, the insurance funding ratio for 2019-20 was 123%, meaning that WorkSafe has \$123 in assets for every \$100 in liabilities. This is a healthy result.
- 121 The second risk concerns the impact of the COVID-19 pandemic more generally. It is too early to assess this risk with any certainty but the impact of more workers working from home, where employers have the same legal duty in respect of worker safety but less control over risks, will need to be monitored.
- 122 Finally, the chapter examines two forms of ‘unconventional work’ that present particular challenges to workers’ compensation schemes not just in Victoria but throughout the world—labour hire and the gig economy.
- 123 In **Chapter 12**, I recommend that WorkSafe, with the approval of the Minister for Workplace Safety, develop and publish a detailed Implementation Plan which outlines how and when the recommendations of this Review will be implemented.
- 124 The chapter also recommends that a WorkSafe Reform Implementation Monitor be appointed under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic). The role of the Monitor will be to oversee the implementation by both the government and by WorkSafe of the recommendations of this Report as detailed in the Implementation Plan. The Monitor will receive quarterly reports from WorkSafe and will report annually to Parliament about progress.
- 125 The phased-in approach of the transfer to WorkSafe of responsibility for the management of complex claims will enable the capacity of the Complex Claims Unit to increase as its file load increases. I am recommending this approach as an alternative to either fully staffing the unit before it has a file load or dramatically increasing the file load all at once. Neither of these approaches would benefit either injured workers or WorkSafe staff.

126 The timeline produced at the end of this executive summary is predicated on a graduated transition. However, neither WorkSafe nor the WorkSafe Reform Implementation Monitor should consider the timeframes to be set in stone. They may need to be modified in light of the experience ‘on the ground’. For example, WorkSafe may find recruiting claims management staff more difficult than expected. If that is the case, it would be better to modify the implementation timetable accordingly.

Should WorkSafe manage all claims?

127 While I do not recommend that WorkSafe assume responsibility for the management of all claims in the short term, this should not be ruled out as a medium-term option. As a number of submissions have pointed out, there are risks to injured workers in the hybrid system that I have recommended. The transfer of claims between organisations can be problematic. However, the sudden departure of CGU from the scheme and the corresponding need to transfer responsibility for managing thousands of claims to other agents and to WorkSafe demonstrates that the current agent model lacks stability.

128 The Terms of Reference for the Review necessarily focussed attention on that cohort of claims which are ‘complex’. The evidence before me does not presently justify the dramatic change to the management of the remaining 80% or so of claims that would result from a wholesale transfer of claims management to WorkSafe.

129 A decision about removing agents entirely from the scheme can only be responsibly made in light of WorkSafe’s performance in handling the approximately 20% of claims that it will assess as complex. The oversight mechanisms of the WorkSafe Reform Implementation Monitor and periodic reviews of the scheme that I recommend are the appropriate means for that assessment to be made as part of the continuous evolution of the scheme.

Recommendation 21: WorkSafe reform implementation plan and quarterly reports

By 1 September 2021, WorkSafe should develop and make publicly available a detailed implementation plan which outlines how and when the

recommendations of this Review will be implemented. The implementation plan should be approved by the Minister for Workplace Safety.

Commencing on 1 December 2021, WorkSafe should provide the WorkSafe Reform Implementation Monitor with a quarterly report outlining what it has done in that quarter to implement the recommendations in accordance with the implementation plan.

Recommendation 22: WorkSafe Reform Implementation Monitor

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to empower the Governor in Council to appoint a WorkSafe Reform Implementation Monitor on either a full or part time basis.

A WorkSafe Reform Implementation Monitor should be appointed by no later than 1 December 2021 for a term of three years.

To be eligible for appointment as the WorkSafe Reform Implementation Monitor, a person should have relevant senior executive management experience and experience of providing evidence-based reports to Government.

The WorkSafe Reform Implementation Monitor should not be subject to direction or control of the Minister. Their powers should be based on those of the Fire Services Implementation Monitor appointed under section 123 of the *Fire Rescue Victoria Act 1958* (Vic).

The principal task of the WorkSafe Reform Implementation Monitor will be to inquire into and report annually to Parliament on the government's and WorkSafe's progress in implementing the recommendations of this Review.

A workers' compensation scheme of which Victorians can be proud

130 Among the many submissions made to the Review was one from the Injured Workers Support Network (IWSN). The IWSN said that when it called for submissions, it was inundated by contributions from its members about their experiences of the Victorian workers' compensation scheme.

131 The submission from the IWSN explained that:

A key theme that emerged from the lived experiences from the IWSN members was, in many cases, workers' injuries have been exacerbated by poor management or lack of timely responses by their employer and the authorised agent managing their claim. Many injured workers state that once it is clear their injury is complex, and there is no easy path back to work, they are treated as a liability. Even when the first

Improving the experience of injured workers

injury sustained at work was physical, many injured workers subsequently suffer a second psychological injury as a result of dealing with their authorised agent within the WorkCover scheme.²⁷

132 No worker should be treated by a workers' compensation scheme as a liability.

133 No worker wants to suffer an injury at work. However, it is a sad fact that thousands of Victorian workers are injured at work each year. In a significant proportion of these cases, the injury occurs because the employer has not complied with its legal obligation to take every reasonably practicable step to safeguard the worker from harm.²⁸

134 Similarly, no worker wants to make a claim on the workers' compensation system. Where a worker makes a claim, the principal object of the system must be to return them to their pre-injury lifestyle as soon as reasonably possible within the constraints of the injury. That lifestyle includes, but is not limited to, employment with their employer, preferably in the role they filled at the time they were injured, or another suitable role.

135 From the day that a worker makes a claim, every effort must be made by WorkSafe, the worker's employer and, within their capacity, the worker, to achieve that outcome.

136 It should not be beyond the capacity of a society that cares about those who, through no fault of their own are injured at work, to ensure that there are adequate resources directed to improving the mental and physical health of those workers and restoring them to their pre-injury lives including access to meaningful and fulfilling employment. They are the goals to which Victoria's workers' compensation system should aspire.

²⁷ Submission DP35 (IWSN) 2.

²⁸ *Occupational Health and Safety Act 2004* (Vic) s 21. For some examples of cases where employers have been found to have breached that duty, see, for example, *DPP v Amcor Packaging Pty Ltd* (2005) 11 VR 557; *R v Commercial Industrial Construction Group Pty Ltd* (2006) 14 VR 321; *Attorney General (NSW) v Tho Services Ltd (in liq)* [2016] NSWCCA 221; *DPP v Vibro-Pile (Aust) Pty Ltd* (2016) 48 VR 676; and *Dotmar EPP Pty Ltd v The Queen* [2015] VSCA 241.

Indicative WorkSafe reform implementation timeline

Date	Milestone	Recommendation
31 May 2021	WorkSafe assumes responsibility for claims previously managed by CGU	
The current schedule of claims WorkSafe will take on from CGU is 539.		
1 July 2021	Transition period for WorkSafe taking over all complex claims commences	
1 September 2021	Publication of WorkSafe’s implementation for this Review’s recommendations, as approved by the Minister for Workplace Safety	21
1 December 2021	WorkSafe Reform Implementation Monitor appointed and role operational	22
	WorkSafe to provide first quarterly report to the WorkSafe Reform Implementation Monitor	21
1 January 2022	WorkSafe to establish a Complex Claims Unit	7
	WorkSafe receives new claims that reach 130 weeks’ duration and new primary mental injury claims	
1 December 2022	First report of WorkSafe Reform Implementation Monitor is tabled in Parliament	22
On the basis of the numbers provided by WorkSafe in Table 12 below, the total number of claims that WorkSafe estimates it would receive between 1 January 2022 – 31 December 2022 is 10, 350.		
1 January 2023	Transition period completed All claims to be provided to WorkSafe by employers WorkSafe’s triage process for identifying complex claims (and claims at risk of becoming complex) established and implemented, including technology and workforce capability. After initial triage, WorkSafe to transfer all non-complex claims to agents	3, 4, 8, 5
30 June 2023	Current agent contracts end	
31 August 2023 and ongoing	Agent to assess claims every 13 weeks for complexity or at risk of becoming complex	6

Improving the experience of injured workers

Date	Milestone	Recommendation
<p>WorkSafe provided information to the Review which assumes that approx. 20% of new claims are complex claims. On this basis, WorkSafe has further calculated that if it was to directly manage complex claims, it would receive an estimated 5,500 new complex claims between 1 January 2023 and 31 December 2023.</p>		
<p>1 July 2024</p>	<p>First statutory independent review of WorkSafe is tabled in Parliament</p>	<p>9</p>

Part A – Background and context

1. Conduct of the Review

'[Master Builders Victoria] welcomes the fact that input is actively being sought from employer associations as part of your Review'¹

- Master Builders Victoria

'The Australian Education Union (AEU) has greatly valued consultation with respect to your review of the agent model in managing complex Workers' Compensation claims'²

- Australian Education Union

Key points

- The Minister for Workplace Safety commissioned an independent review into the management of complex workers' compensation claims by WorkSafe agents.
- The Review follows two Victorian Ombudsman reports into complex workers' compensation claims.
- The Review investigated the adequacy, suitability and effectiveness of the agent model by consulting with injured workers, employers, unions, independent experts and others and by examining the published research.
- This Report provides recommendations on how and by whom complex claims should be managed to maximise outcomes for injured workers, having regard to the need to maintain the financial viability of the scheme.

Purpose of the chapter

1.1. The purpose of this chapter is to provide an overview of how the Review was conducted and finalised including:

- the scope of the Review;

¹ Submission DP41 (MBV) 1.

² Submission DP9 (AEU) 1.

- the broader context in which the Review was conducted;
- the consultative process that was followed; and
- how evidence was gathered for the Review.

Overview

- 1.2. On 3 February 2020, the Hon Jill Hennessy MP, then Attorney-General and Minister for Workplace Safety appointed me, Peter Rozen QC, to conduct an independent review into the management by WorkSafe agents of complex workers' compensation claims.
- 1.3. The Review responds to the recommendation of the Victorian Ombudsman's follow-up report into complex workers' compensation claims, published in December 2019.³ The Ombudsman recommended an independent review of the agent model.
- 1.4. The Terms of Reference for the Review were released by the Hon Jill Hennessy MP on 26 June 2020.⁴ In summary, they require the Review to 'determine how and by whom complex claims should be managed to maximise outcomes for injured workers, having regard to the need to maintain the financial viability of the scheme'.⁵
- 1.5. In July 2020, to assist me in the conduct of the Review, a small team under the leadership of Dr Kirsten McKillop was established within the Department of Justice and Community Safety.
- 1.6. At the end of October 2020, I provided an interim report to the Minister for Workplace Safety, Ms Ingrid Stitt MP, on the progress of the Review. The interim report included:
 - a summary of consultation, including methodology, key themes and commonalities across individuals and organisations;
 - a statement of the problems that were identified during consultation and through research, which recommendations in the final report aim to address;
 - preliminary findings; and

3 Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019) ('Victorian Ombudsman 2019').

4 The full Terms of Reference for the Review are reproduced in full above.

5 Terms of Reference, para 12.

- an overview of the steps that would be taken between the interim and final reports to reach recommendations.
- 1.7. Following further consultation and gathering of evidence, the final report provides the Minister for Workplace Safety with:
- illustrations of the unsatisfactory management of complex claims by WorkSafe agents and unsatisfactory oversight of agents by WorkSafe;
 - examples of unsatisfactory agent behaviour;
 - evidence of best practice approaches to complex claims management in other schemes;
 - findings that address the Terms of Reference; and
 - 22 recommendations to improve WorkSafe's claims management model.

Scope of the Review

- 1.8. The scope of the Review is set out in the Terms of Reference at paragraphs 11 to 18. This section provides a summary of key elements and matters in and out of scope.
- 1.9. The Review was undertaken to:
- investigate the adequacy, suitability and effectiveness of the agent model in managing complex WorkCover claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (WIRC Act);
 - determine how and by whom complex claims should be managed to maximise outcomes for injured workers, having regard to the need to maintain the financial viability of the scheme; and
 - consider the personal circumstances of injured workers that may contribute to claims becoming 'complex'.⁶
- 1.10. In making its findings and developing recommendations, the Terms of Reference provide that the Review should inquire into:
- whether the agent model is effective in delivering and achieving positive health and recovery outcomes, including prompt, effective and proactive treatment and management of injuries;
 - whether case management processes and practices for complex claims reflect best practice and provide tailored treatment and support based on biopsychosocial factors, individual circumstances and medical advice; and

⁶ Terms of Reference, paras 11-13.

Improving the experience of injured workers

- whether policy, oversight and governance arrangements, including financial and performance incentives support and promote best practice, timely, sustainable and quality decision making by agents.⁷
- 1.11. The Terms of Reference require the following to be considered:
- the experiences of other national and international compensation and insurance schemes;
 - relevant research and legislative reforms relating to the workers' compensation scheme;
 - emerging risks and the potential impact of these risks on the viability of the scheme; and
 - the implications of retaining, limiting or removing agents from performing claim management functions on behalf of WorkSafe.⁸
- 1.12. The Terms of Reference define 'complex claims' as those where an injured worker has received 130 weeks or more of weekly payments.⁹
- 1.13. However, in assessing the management of complex claims, it is essential and within scope of the Review to examine how such claims can be identified well in advance of them reaching 130 weeks. As such, the Review makes recommendations to prevent claims from becoming 'complex' in the first instance.¹⁰
- 1.14. Throughout my consultations with interested individuals, organisations and workers I heard that the definition of 'complex claims' in the Terms of Reference is too narrow. I discuss the nature of complex claims and the adequacy of the definition relied upon in the Terms of Reference in Chapter 6.
- 1.15. In forming recommendations, the Review must also consider the implications of any changes for the financial viability of the workers' compensation scheme and the cost of WorkCover insurance for employers.¹¹
- 1.16. Although the Terms of Reference provide the Review with some flexibility of scope,¹² it is important to record that the Review is not a general review of the Victorian workers' compensation scheme. I have not been asked to examine benefit levels, dispute resolution processes or other central aspects of the

7 Terms of Reference, para 15.

8 Terms of Reference, para 16.

9 Terms of Reference, para 13.

10 Terms of Reference, para 14.

11 Terms of Reference, para 18.

12 Terms of Reference, para 15(d), discussed in Chapter 10.

scheme. Nor have I been asked to examine claims management generally. My Terms of Reference are quite specific and are confined to 'complex claims'.

- 1.17. Some interstate workers' compensation schemes are the subject of periodic reviews. In Chapter 10, I recommend that the Victorian scheme should also be the subject of periodic reviews.

Context of the Review

- 1.18. The Victorian Ombudsman's 2019 report followed an initial investigation in 2016 into WorkSafe and its agents.¹³ Both the 2016 and 2019 reports highlighted several deficiencies that indicated a significant number of complex claims being mishandled by agents. This included evidence of:

- unreasonable decision-making across all five agents;
- agents maintaining unreasonable decisions at conciliation, forcing workers to take the matter to court or terminate their claim without compensation;
- financial rewards encouraging agents to focus on rejecting or terminating WorkCover entitlements; and
- limited accountability or oversight mechanisms of agent decisions.

- 1.19. The Ombudsman's report attracted media interest in July 2020, with the findings being reported in television and newspaper media. In interviews with journalists, including an ABC 'Four Corners' episode and a newspaper article in 'The Age'/'The Sydney Morning Herald', the Ombudsman was reported as stating that in some instances the case management she had observed was '...downright immoral and unethical'.¹⁴

- 1.20. There was some criticism from agents of the methodology used by the Ombudsman in her 2016 and 2019 investigations. I am satisfied that the methodology used by the Ombudsman in conducting the reports was rigorous. I accept the evidence relied upon by the Ombudsman in both of her reports and the findings contained in them.

¹³ Victorian Ombudsman, *Investigation into the Management of Complex Workers Compensation Claims and WorkSafe Oversight* (Report, September 2016) 15.

¹⁴ See Adele Ferguson, Lauren Day and Lesley Robinson, "'Snouts in the trough'" circle Australia's \$60b workers' comp system', *The Age/The Sydney Morning Herald* (online), 27 July 2020 <<https://www.smh.com.au/business/companies/snouts-in-the-trough-circle-australia-s-60b-workers-comp-system-20200726-p55fiu.htm>>.

- 1.21. A more detailed exploration of the two Ombudsman's reports is provided in Chapter 5, along with other reviews of Victoria's workers' compensation scheme.
- 1.22. The Ombudsman made two recommendations directed to the Victorian Government and 13 directed to WorkSafe in her 2019 report. The Victorian Government and WorkSafe accepted all recommendations.¹⁵
- 1.23. WorkSafe's steps to respond to the recommendations in the 2019 report are summarised in Chapter 7.

Relevant reform programs

- 1.24. The Review's Terms of Reference require consideration of 'any relevant work that is being or has already been undertaken in this area, including recent or ongoing legislative and regulatory reforms relating to the Act and workers' compensation system'.¹⁶ Relevant work, including legislative reform, is briefly summarised below:

- **provisional payments**—Recent legislation provides for 'provisional liability payments' for workers with mental injury claims.¹⁷ These payments provide workers with mental injury claims with compensation for the reasonable costs of medical treatment relating to the injury for up to 13 weeks, prior to a decision being made on their claim, or where the claim is rejected. Provisional payments are described in more detail in Chapter 3.
- **arbitration**—A new dispute resolution process is intended to be introduced within the next two years. The Accident Compensation Conciliation Service will be able to make binding determinations in respect of workers' compensation disputes which are not resolved by conciliation. This gives effect to Recommendation 2 of the Victorian Ombudsman's 2019 report. The dispute resolution process under the WIRC Act is described in Chapter 3.
- **premium review**—The WIRC Act provides that the Minister for Workplace Safety must, 'before 1 July 2015 and once in each period of five years after that date, cause a review to be undertaken by an independent expert review body on any matter relating to the setting of premiums under Part 10 of the Act'.¹⁸ The Minister commissioned a premium review which was completed in early 2021. I have not seen the report of that review but I expect that it would consider risks (including emerging risks) to liabilities. Equally, this Review's Terms of Reference require it to consider 'the impact of emerging risks which

15 Victorian Ombudsman 2019 (n 3) 225–227.

16 Terms of Reference, para 16d.

17 *Workplace Injury Rehabilitation and Compensation Amendment (Provisional Payments) Act 2021* (Vic).

18 WIRC Act s 490(1).

may impact claim numbers and to the viability of the workers' compensation scheme'.¹⁹ These emerging risks are described in Chapter 11.

How the Review gathered evidence

- 1.25. The Review examined published research, consulted with a wide range of people, received formal submissions from interested parties and conducted a survey.

Research

- 1.26. The Review has undertaken extensive review of relevant literature, both from Australian sources and internationally, analysing over 300 sources.
- 1.27. The Review has also analysed extensive data provided by WorkSafe. This includes administrative costings to assist with considering the financial impact of options under consideration.

Consultation

- 1.28. The Review held 44 consultations with interested groups, individuals and organisations.
- 1.29. Because of the restrictions on movement due to COVID-19 during 2020 and 2021, all consultations were virtual. Consultations used widely available videoconferencing facilities. The variety of methods aimed to ensure a wide range of interested groups and individuals could contribute to the Review using a form of communication that best suited their needs.
- 1.30. The consultations generally took a roundtable format, bringing together parties with similar or related interests. This allowed me to listen to and speak directly with a wide range of people and organisations.
- 1.31. These consultations were extremely beneficial to the conduct of the Review. I am grateful to all those who have generously given of their time and expertise to participate.

Consultation with workers

- 1.32. Two online discussions were held with injured workers. The online discussions with injured workers were organised in collaboration with:
 - the Injured Workers Peer Support Network, a volunteer-based group that provides assistance and support to injured workers. Four workers participated in this online discussion; and

¹⁹ Terms of Reference, para 16c.

Improving the experience of injured workers

- three unions — the Community and Public Sector Union, the United Firefighters Union of Australia and Australasian Meat Industry Employees' Union. Seven workers participated in this online discussion.
- 1.33. The Review also held 16 extended telephone calls with workers. Twelve of these telephone calls were with workers who had expressed an interest in sharing their experiences with the Review. Four of these telephone calls were facilitated through Slater and Gordon Lawyers, and a representative of the law firm was present during these calls.
- 1.34. All workers with whom the Review engaged had sustained workplace injuries and have direct experience of the claims process. For some of these calls and online discussions, workers attended with their partner or a support person.
- 1.35. These meetings provided the workers with an opportunity to present their experiences and views on the current approach to claims management in the Victorian workers' compensation scheme. They also discussed potential solutions. The courage of these workers, a number of whom had mental injuries, is remarkable. I thank them for sharing their stories and insights with the Review.
- 1.36. The experiences of the workers who the Review engaged with is at the heart of this Report. Because of that, quotes and case studies from these workers feature throughout the Report. In this Report, workers have at times been given a pseudonym and have been deidentified in the list of consultations. The quotes and case studies of workers illustrate a small sample of the human impact of the failings of the current workers' compensation system in Victoria.

Expert panel

- 1.37. I was advised by a panel of experts assembled specifically for the Review. I held two video conference discussions with the panel exploring aspects of the Review. The panel included medical practitioners, researchers and people with extensive experience of workers' compensation schemes. A full list of the Review's expert panel members and a brief description of their expertise is provided at Appendix B.
- 1.38. In addition to the two video conference consultations, the Review's expert panel members provided submissions in response to both the discussion paper and the options paper.

Virtual roundtables with interested groups and representatives of other schemes

- 1.39. I also held video-conference consultations and roundtables with interested groups and individuals including:
- WorkSafe;

Improving the experience of injured workers

- WorkSafe agents;
 - Unions and union peak bodies;
 - Employer representative peak bodies;
 - Medical and rehabilitation provider peak bodies;
 - Organisations involved in the dispute resolution process (Accident Conciliation and Compensation Service, Medical Panels); and
 - Legal practitioners involved in workers' compensation and legal peak bodies
- 1.40. I have been greatly assisted in the conduct of the Review by senior officers of WorkSafe including Mr Colin Radford, the Chief Executive. Members of the Review team were in frequent contact with WorkSafe officers who responded professionally to all of the requests made of them. I am grateful for their co-operative approach and this report is the better for it.
- 1.41. Paragraph 16a of the Terms of Reference requires the Review to consider:
- the experience of other compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international compensation jurisdictions or insurance schemes including the National Disability Insurance Scheme.
- 1.42. I held consultations with, and received considerable other assistance from, senior employees of:
- Victoria's Transport Accident Commission;
 - Queensland's workers' compensation scheme and its regulator;
 - The National Disability Insurance Scheme;
 - New Zealand's Accident Compensation Corporation;
 - The workers' compensation scheme of British Columbia, Canada; and
 - The workers' compensation scheme of the State of Washington, USA.
- 1.43. Many of these schemes were recommended in submissions as high performing schemes or as compensation schemes which incorporated elements of best practice.
- 1.44. I was greatly assisted by the significant knowledge and experience of all of those who were consulted. I thank them all.
- 1.45. A full list of the Review's consultations is at Appendix A.

Review webpage

- 1.46. The Review has a webpage on the 'Engage Victoria' website www.engage.vic.gov.au. There have been more than 2230 visitors to the webpage.
- 1.47. The webpage provided information about the variety of ways people could have their say, including by completing the survey described below. The website also published:
- an overview of the Review;
 - the Terms of Reference;
 - a timeline of the Review's work;
 - a discussion paper;
 - submissions in response to the discussion paper; and
 - survey responses.

Discussion paper submissions

- 1.48. The Review sought formal written submissions in response to a discussion paper released on 20 August 2020. The discussion paper was published on the Engage Victoria website, and was also distributed directly to groups and individuals identified as having an interest in the Review. It asked questions relevant to the Terms of Reference.
- 1.49. The Review received 62 written submissions from a range of people and organisations. Extensive reference is made to those responses in the report.²⁰ A full list of submissions to the discussion paper is at Appendix C.

Options paper submissions

- 1.50. Findings from initial consultation, submissions and research informed the development of seven options for reform. These options were outlined in an options paper dated December 2020. The seven options explored who should manage complex workers' compensation claims in Victoria.
- 1.51. The options paper sought feedback through written submissions from a targeted group of organisations, individuals and experts from relevant fields.

²⁰ Submissions to the discussion paper are referred to by number with the prefix 'DP'. The list of submissions is at Appendix C.

Improving the experience of injured workers

- 1.52. I received 17 written submissions in response to the options paper. These are also referenced throughout the report to show the breadth of views I heard on each option.²¹
- 1.53. WorkSafe provided a submission in response to the discussion paper but did not respond to the options paper. As noted previously, it provided costings to assist with considering the financial impact of options under consideration.
- 1.54. A full list of submissions responding to the options paper is at Appendix D. A detailed discussion of submissions responding to the options paper is provided in Chapter 9.

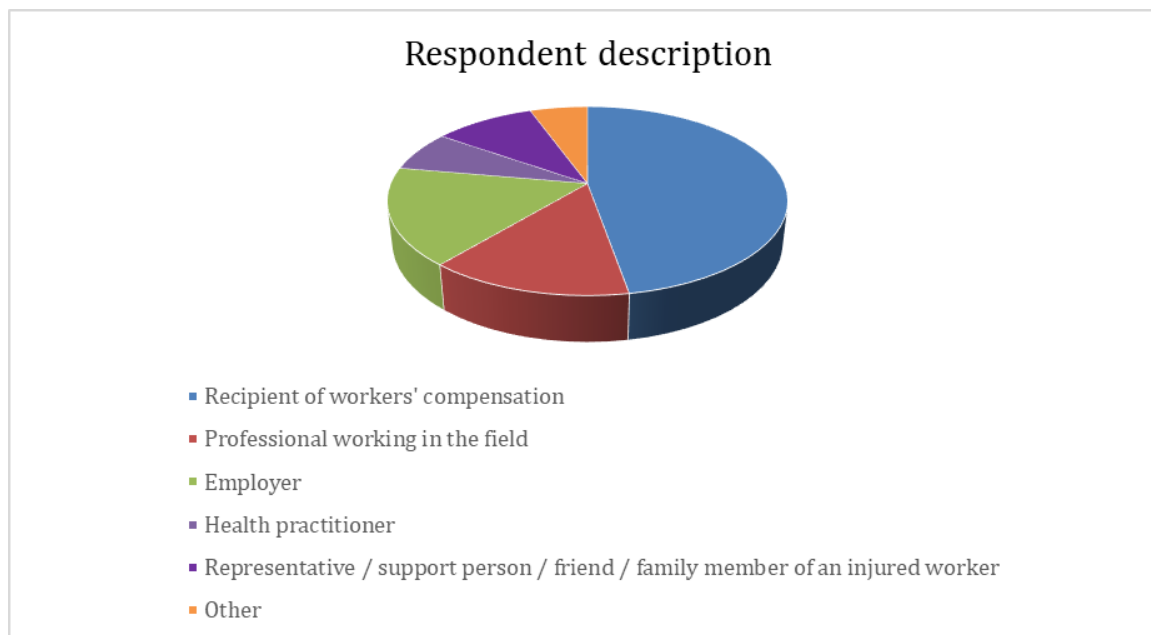
Survey

- 1.55. From August to October 2020, the Review made an online survey available to the public on the Engage Victoria website. The survey addressed the key themes of the Review. The survey provided an opportunity for people to tell the story of their experience with the Victorian workers' compensation scheme anonymously.
- 1.56. The survey was open for 36 days. There were 72 survey responses from 66 contributors.
- 1.57. Of the 72 surveys completed:
 - seventy-five percent (54) of respondents shared their individual story;
 - sixty-eight percent (49) of respondents gave permission for their response to be published; and
 - nineteen percent (14) indicated they intended to submit a formal written submission to the Review.
- 1.58. All key interest groups were represented in the responses received. Respondents identifying themselves as injured workers made up the largest proportion (forty-seven per cent) followed by employers (seventeen per cent) (Figure 1).
- 1.59. Extensive references are made to the survey responses in the report.²²

21 Submissions to the options paper are referred to by number with the prefix 'OP'. The list of submissions is at Appendix D.

22 Surveys responses are deidentified and are referred to by number. The interest group of the survey participant is indicated in brackets.

Figure 1: Breakdown of survey respondents



1.60. The case study below describes the experience of one injured worker with the Victorian workers' compensation scheme.

Case study – 'Naomi'

Naomi is a 36-year-old disability worker. She was assaulted by a client and has been on workers' compensation for the past 18 months. When Naomi reported the incident to her manager, she was told to take the client to hospital for treatment and remain with the client until she was relieved of duty. While at the hospital, Naomi was diagnosed with a fractured arm and nerve damage. Naomi had her arm in plaster for nine months before she saw a hand surgeon or therapist.

Naomi said *'The Independent Medical Examiner said I had no capacity, but they harassed me to return to work'*. Naomi told the Review *'I'm completely broken and have no idea if I'll ever achieve my life goals. I'm shocked that someone who has dedicated 18 years to care for people can be treated like this'*. Naomi said that her family and friends have watched her become a person they don't know: *'I'm moody, emotional, withdrawn, suicidal. I'm not the fun optimistic person I used to be. I rely on daily medication for pain relief.'*

Naomi joined a peer support group which she described as invaluable in her recovery. Through her involvement with this peer support group, Naomi was able to share her experiences with other injured workers in a supportive and safe environment. The group's administrator also acted as an advocate for Naomi. Naomi felt harassed and anxious after receiving multiple calls each day from different case managers telling her different things—including that her certificates were not valid or that her payments would be cut off. The support group's administrator assisted Naomi to deal with the agent and to explain to the agent the impact of their conduct on Naomi.

Naomi told the Review that every worker should receive a support worker from day one:

Improving the experience of injured workers

No-one else cares. I can't express how grateful I am for [the peer support group's administrator]. I wouldn't be here without [them]. Someone I can confide in and trust. [Their] support has been imperative.

2. History of Victoria's workers' compensation scheme

'the most significant economic and social reform introduced to the Parliament in a quarter of a century'.¹

'the cases we investigated are not merely files, numbers or claims; they involved people's lives, and the human cost should never be forgotten'.²

Key points

- The purpose of workers' compensation schemes in Victoria has remained consistently the same: the prevention of, and rehabilitation from, work-related injuries and illness.
- Early reviews and reports anticipated a state-run accident compensation scheme.
- The agent model implemented in 1985 appears to be the result of a political compromise to facilitate the passage of the proposed legislation in the Legislative Council in which the Government did not have a majority.
- Successive reports on Victoria's workers' compensation scheme have identified underlying deficiencies.

Purpose of the chapter

- 2.1. The purpose of this chapter is to provide an overview of the history of Victoria's workers' compensation system, including:

1 Second Reading Speech for the *Accident Compensation Bill 1985*: Victoria, Parliamentary Debates, Legislative Assembly, 2 July 1985, 1005 (Robert Jolly, Treasurer).

2 Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight* (Report, September 2016) 5 ('Victorian Ombudsman 2016').

- the underlying policies and objectives that led to the development of the current scheme; and
 - the historical reviews and inquiries that contributed to the adoption of the agent model.
- 2.2. It is apparent from the history of the scheme and reviews outlined below that the Victorian workers' compensation scheme has, for the last 35 years been in 'an almost constant process of foment and change'.³

Early developments

- 2.3. The present-day Victorian workers' compensation system owes its origins to the 1897 *British Workmen's Compensation Act*.⁴ That significant piece of social reform '... developed out of the demands for an appropriate legislative response to the narrow scope of common law compensation for work-related injuries'.⁵
- 2.4. The 1897 Act provided that a 'workman' who suffers a personal injury by accident 'arising out of and in the course of employment' is entitled to be compensated by his employer.
- 2.5. Judicial interpretation of the law emphasised its ameliorative and beneficial character.⁶ As early as 1909, a member of the House of Lords observed that the 'remedial Act' should not be 'construed in any narrow spirit'.⁷
- 2.6. The law in Great Britain has heavily influenced developments throughout the common law world. From the outset, the law was only concerned with compensating injured workers in defined circumstances. It was not concerned with preventing injuries and ill health; nor was the rehabilitation of injured workers part of its focus.
- 2.7. By contrast, the world's first workers' compensation system, established in 1884 in Germany, was heavily focused on both accident prevention and vocational rehabilitation.⁸ That trend has continued to this day in France, Germany and

3 Alan Clayton, Richard Johnstone and Sonya Sceats, 'The Legal Concept of Work-Related Injury and Disease in Australian OHS and Workers' Compensation Systems' (2002) 15(2) *Australian Journal of Labour Law* 105, 152.

4 Richard Johnstone, Elizabeth Bluff and Alan Clayton, *Work Health and Safety Law and Policy* (Lawbook, 3rd ed, 2012) 53–59, 62–63.

5 Johnstone, Bluff and Clayton (n 4) 63.

6 See generally E.F. Hill and J. B. Bingeman, *Principles of the Law of Workers' Compensation, particularly in Victoria* (Lawbook, 1981) 3–5; ch 5.

7 *Low or Jackson v General Steam Fishing Company Ltd* (1909) AC 523, 532 (Lord Loreburn). See also *Wilson v Chatterton* (1946) KB 360, 366 (Scott LJ).

8 Alan Clayton, 'Attack upon the citadel: reform of Australia's anti-rehabilitation statutes' (1986) 3(4) *Journal of Occupational Health and Safety – Australia and New Zealand* 351, 353.

other European countries and has also influenced the development of the law in some Canadian provinces.

The first Victorian laws

- 2.8. The first Victorian enactment, the *Workmen's Compensation Act 1914*, was closely modelled on the British statute of 1897. It and its successor Acts have been construed as beneficial legislation in a manner similar to the British statutes discussed above. For example, in 1962, the Victorian Supreme Court said the *Workers' Compensation Act 1958* (Vic) 'should be construed in aid of injured and disabled workers'.⁹
- 2.9. The 1914 Victorian Act was administered by a combination of private insurers and a State Insurance Office. This was consistent with the approach taken in other Australian States with the exception of Queensland which in 1916 established a central government-controlled fund.¹⁰
- 2.10. By the early 1980's, the system under the *Workers Compensation Act 1958* (Vic) was based on providing injured workers with lump sums of money calculated on their percentage of disability. The system had little if any focus on either accident prevention or occupational rehabilitation.
- 2.11. The vital importance of accident prevention and occupational rehabilitation had been emphasised in Australia and overseas by academics and in official reports.¹¹ At the federal level, the 1974 Rehabilitation and Compensation Inquiry by New Zealand Justice Woodhouse recommended the implementation in Australia of a national compensation and rehabilitation scheme based on the New Zealand accident compensation scheme.¹² The Woodhouse Report recommended a paradigm shift away from lump sum compensation in favour of greater emphasis on accident prevention and helping those who are injured in motor, work and other accidents to return to normal life as quickly as possible.
- 2.12. While the legislation giving effect to the Woodhouse recommendations (the National Compensation Bill) was a victim of the dismissal of the Whitlam government in November 1975, those recommendations 'have had a continuing relevance at the State level in areas of both [motor] accident and workers'

9 *Cleveland v Goold & Porter Pty Ltd* (1962) VR 2, 14; see also *Dodd v Executive Air Services Pty Ltd* (1975) VR 668, 679 and 682.

10 Marianna Stylianou, *To Strike a Balance: A History of Victoria's Workers' Compensation Scheme, 1985-2010* (Report, June 2011) 6.

11 See, eg, Colin Phegan, 'From Compensation to Care – A Change of Direction for Accident Victims?' (1985) 10(1) *Adelaide Law Review* 74; Clayton (n 8); Australia, National Rehabilitation and Compensation Committee of Inquiry, *Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry* (Report, July 1974).

12 Australia, National Rehabilitation and Compensation Committee of Inquiry (n 11).

compensation’ and, to some extent, in the National Disability Insurance Scheme.¹³

The Cooney Report—1984

- 2.13. By the early 1980’s, the Victorian workers’ compensation system was in crisis. There were delays of up to two years in delivering benefits to injured workers and their dependants. At the same time, employer premiums were increasing at alarming rates.¹⁴
- 2.14. The government established an inquiry to examine the system and recommend a replacement. The Inquiry was conducted by five members who represented different interest groups. It was chaired by Mr Barney Cooney, an experienced workers’ compensation barrister.
- 2.15. The Cooney Report, as the report of the Inquiry came to be known, concluded that the Victorian workers’ compensation system was ‘limited in the benefit it provides to workers and yet is arguably the most expensive system in Australia’.¹⁵ ‘Dramatic surgery’ was needed to address these flaws.¹⁶
- 2.16. Echoing the Woodhouse Report of 1974, the Cooney Report concluded that the ‘pre-eminent objective of the workers’ compensation system should be the prevention of industrial injuries and occupational diseases’.¹⁷ It also concluded that ‘rehabilitation should play a major part in any compensation system’.¹⁸
- 2.17. The Victorian workers’ compensation system prior to the Cooney Report was a funded, multi-insurer system. A ‘multi-insurer’ system is one where multiple insurance companies compete to insure employers in respect of their statutory liabilities. An alternative funding system is to have one central fund that underwrites the entire scheme. Such a scheme had been favoured by a 1977 review into Victorian workers’ compensation, led by Justice C.W. Harris.¹⁹ However, the government of the day was ‘reluctant to replace the existing system with a public agency’.²⁰

13 Brian Howe, ‘Social Policy’ in Troy Bramston (ed), *The Whitlam legacy* (Federation Press, 2015) 202.

14 Harry Curtis and Gordon Hughes, *Accident Compensation Handbook* (Lawbook, 1986); B.C. Cooney, *Committee of Enquiry into the Victorian Workers’ Compensation System 1983/84* (Report, 1984) (‘Cooney Report’).

15 Cooney Report (n 14) Foreword, 2.

16 Cooney Report (n 14) Foreword, 2.

17 Cooney Report (n 14) ch 3, 17 [3.1.1].

18 Cooney Report (n 14) ch 4, 3 [4.1].

19 Judge C.W. Harris, *Board of Inquiry into Workers’ Compensation* (Report to Governor of Victoria, 1 March 1977) 13.

20 Stylianou (n 10) 10.

- 2.18. The Cooney Report noted that an argument in favour of a central fund is that ‘profit considerations are inconsistent with the goals of a workers’ compensation scheme – private enterprise should not have control of what some perceive to be a “social service”’.²¹ Further, ‘accident prevention and rehabilitation are more efficiently promoted and managed through a central fund’.²² Finally, risks associated with the failure of an insurer are removed.²³
- 2.19. As against those arguments, the Cooney Report noted that an argument in favour of the status quo was that competition drives down premium costs and generates innovation. Further, because the system is compulsorily funded by private and public employers, ‘it cannot logically be described as a social service’.²⁴ Finally, government monopolisation will lead to inefficiencies and increased costs.²⁵
- 2.20. Ultimately, the Cooney Report concluded by a majority of 3-2 that the scheme should continue to have a multiplicity of insurers operating on a funded basis.²⁶ Unfortunately, the detailed discussion of the pros and cons of the alternatives was not matched by any explanation of why one was chosen over the other.
- 2.21. This was apparently not the outcome that the government was anticipating. In announcing the Cooney Inquiry in July 1983, the Minister for Labour and Industry, The Hon William Landeryou had referred favourably to the centrally administered Queensland scheme and ‘earlier inquiries that had recommended the establishment of a central fund’. The Minister noted in an apparent reference to the unimplemented Harris Review of 1977, that ‘previous governments have not been prepared to bite the bullet’. He said that the current system was in ‘urgent need of overhaul’ and that the object of the inquiry was to ‘find a way in which we can maximise the benefits of people who are injured and suffer from accidents in an industrial scene at a minimum cost’.²⁷

WorkCare—1985–1992

- 2.22. The government gave effect to the bulk of the recommendations in the Cooney Report in 1985 through the *Accident Compensation Act 1985* (Vic) and the *Occupational Health and Safety Act 1985* (Vic). The ‘WorkCare’ package of

21 Cooney Report (n 14) ch 5, 17 [5.34].

22 Cooney Report (n 14) ch 5, 18 [5.48].

23 Cooney Report (n 14) ch 5, 17 [5.41].

24 Cooney Report (n 14) ch 5, 19 [5.51].

25 Cooney Report (n 14) ch 5, 18-19 [5.49-5.50].

26 Cooney Report (n 14) ch 5, 33 [5.92].

27 ‘State to consider central workers’ comp fund’, *The Age* (Melbourne, 7 July 1983) 3.

reforms, as it was known, was described by the Victorian Treasurer Mr Jolly as ‘the most significant economic and social reform introduced to the Parliament in a quarter of a century’.²⁸

- 2.23. The government rejected the Cooney Report’s recommendation of a multi-insurer system. The government considered that its policy objectives of ‘better accident prevention and rehabilitation and a much lower cost to employers’ could best be attained through a central fund administered by a government body.²⁹
- 2.24. The scheme introduced by the *Accident Compensation Act 1985* (Vic) was a central fund which would operate on a ten year fully funded basis.³⁰ The *Accident Compensation Act 1985* (Vic) established an Accident Compensation Commission with responsibility for the administration of the scheme. Private insurers would continue to have a role but not the one they previously had. Henceforth, they would be able to tender for roles in claims administration, fund investment and data collection.³¹ Nine ‘claims administration agents’ were appointed for three-year terms.³²
- 2.25. It appears, as has been submitted to this Review by an advisor to the Cooney Inquiry, Mr Alan Clayton, that the agent model implemented in 1985 ‘was the result of a political compromise’ to facilitate the ‘passage of the proposed legislation in the Legislative Council in which the Government did not have a majority’.³³ The submission characterised the hybrid model ushered in by the 1985 Act as ‘a mutant genus that has no recognised progenitor’.³⁴ It was neither centrally administered like the Queensland scheme but nor was it a private insurance scheme such as Victoria had before 1985.
- 2.26. A 1997 review of the scheme conducted by the internationally recognised Upjohn Institute of Employment Research noted that this ‘mixed public-private system’ is quite unusual although not unique. The report noted that, workers’ compensation schemes generally operate under either a central government run

28 Victoria, *Parliamentary Debates*, Legislative Assembly, 2 July 1985, 1005 (Robert Jolly, Treasurer).

29 Curtis and Hughes (n 14) 42.

30 Curtis and Hughes (n 14) 42-43.

31 Curtis and Hughes (n 14) 46.

32 Curtis and Hughes (n 14) 46.

33 Submission DP3 (Alan Clayton).

34 Submission DP3 (Alan Clayton).

fund which underwrites risk or allow for employers to insure with one of a number of private insurers which compete for their business.³⁵

2.27. In broad outline, the 1985 Act provided for the following:

- Injured workers were entitled to weekly payments of compensation for as long as they were incapacitated for work at the rate of the lesser of 80% of the worker's pre injury average weekly earnings or \$400;³⁶
- Employers were liable for the first \$250 of 'medical and like services' and the first five days of a claim. Beyond that the liability was to be met by the Accident Compensation Commission;³⁷
- Common law claims were limited to compensation for non-pecuniary loss;³⁸ and
- An independent tribunal, the Accident Compensation Tribunal, would determine disputes under the Act.³⁹

2.28. In addition to the Accident Compensation Commission, two other statutory bodies were established as part of the WorkCare reform package:

- the Victorian Accident Rehabilitation Council, which oversaw the rehabilitation of injured workers;⁴⁰ and
- the Victorian Occupational Health and Safety Commission, which was responsible for setting (but not enforcing) occupational health and safety standards.⁴¹

2.29. These three statutory bodies were tripartite with representatives from employers, employees and government.

The Victorian WorkCover Authority—1992–1999

2.30. In 1992, the WorkCare scheme was dismantled after a change of government. The Accident Compensation Commission, the Accident Compensation Tribunal, the Victorian Accident Rehabilitation Council and the Victorian Occupational Health and Safety Commission were all abolished by the *Accident Compensation (WorkCover) Act 1992* (Vic). The purpose of that Act was to 'make fundamental changes to the scheme of workers' compensation operating in Victoria featuring

35 H. Allan Hunt et al, *Victorian Compensation System: Review and Analysis* (Report, 29 August 1997) vol 1, 4-1.

36 *Accident Compensation Act 1985* (Vic) ss 93–95.

37 *Accident Compensation Act 1985* (Vic) s 99, s 125.

38 *Accident Compensation Act 1985* (Vic) s 135(2).

39 *Accident Compensation Act 1985* (Vic) s 39(1). The Tribunal had both a Conciliation Division and a Tribunal Division.

40 *Accident Compensation Act 1985* (Vic) s 157; see also Curtis and Hughes (n 14) ch 12.

41 *Occupational Health and Safety Act 1985* (Vic) (now repealed), Part II.

greater emphasis on rehabilitation and early return to work and better targeting of compensation payments'.⁴²

- 2.31. Access to common law damages was limited in 1993 and ultimately abolished in 1997.⁴³ Statutory benefits ceased after 104 weeks if a worker was not seriously injured or totally and permanently incapacitated.
- 2.32. The 1992 Act established the Victorian WorkCover Authority (VWA) to manage the scheme in place of the former Accident Compensation Commission and the other WorkCare bodies.⁴⁴ In response to government concerns about the financial viability of the scheme, the Board was made up of members with 'extensive commercial and management experience'.⁴⁵ The government dispensed with the previous tripartite Board structure which had been a feature of the various WorkCare statutory bodies.
- 2.33. In 1993, the *Accident Compensation (WorkCover Insurance) Act 1993* (Vic) was enacted. Employers were required to seek insurance from licensed insurers. The licensed insurers were in turn required to reinsure their liabilities with the VWA. The VWA was required to maintain a statutory fund for each insurer. The insurance risks of the insurers were thus pooled.
- 2.34. In July 1993, 16 authorised insurance providers were licensed as WorkCover insurers. Employers, who were now to be liable for the first 10 days of a worker's injury, became directly liable for workers' compensation.
- 2.35. A 1997 report into the scheme described the insurers' role under WorkCover as 'more substantial than it was under WorkCare but less substantial than it was under the private system previous to WorkCare'.⁴⁶
- 2.36. As a result of these reforms, full-time staff employed by the former WorkCare statutory bodies, whose employment was transferred to the new VWA, fell from more than 1,000 in 1992 to 283 at the end of the 1993/4 financial year. The role of the government had shifted 'from a provider of workers' compensation services to a regulator of the scheme'.⁴⁷

42 *Accident Compensation (WorkCover) Act 1992* (Vic) s 1(a).

43 *Accident Compensation (Miscellaneous Amendment) Act 1997* (Vic) s 45; Stylianou (n 10) 52-53.

44 The VWA also became responsible for injury prevention when it took over the role of the Victorian Occupational Health and Safety Commission in 1996 – see *Accident Compensation (Occupational Health and Safety) Act 1996* (Vic). It continues to perform both functions.

45 Stylianou (n 10) 46.

46 Hunt et al (n 35) 4-7.

47 Stylianou (n 10) 45.

2.37. It was the government's stated intention to privatise the system entirely so that each insurer would bear its own risks as had been the case prior to 1985.⁴⁸ However, in the lead up to the 1999 State election, the government decided not to proceed to full privatisation apparently because of a lack of support from employers.⁴⁹ The government, which fell at the 1999 election, had decided to persist with the hybrid arrangement under which private insurers and the VWA shared administration of the scheme.

WorkSafe Victoria—2013–2021

2.38. After the frenetic pace of change in the workers' compensation system between 1985 and 1999, the subsequent two decades have been relatively stable. In its annual report for the 2001-2 financial year, the VWA's Chief Executive noted that:

In the past, improvement in scheme performance has been either a function of legislative change restricting injured workers benefits or has been one-dimensional, where a focus on one problem area has seen the creation of another.⁵⁰

2.39. A change of government at the 1999 election saw the new government immediately restore common law access and improve statutory benefit levels.⁵¹ The period since 2002 has been characterised by a greater willingness on the part of the VWA to improve its management of the scheme by making internal administrative changes.⁵²

2.40. The Victorian WorkCover Authority was 'rebranded' as 'WorkSafe Victoria' with effect from April 2001.⁵³ This change was given legislative effect in 2010 when 'WorkSafe' became the Authority's 'trading name'.⁵⁴ I use the term WorkSafe in the report, as it is widely used and understood by the public.

2.41. The period during which an incapacitated worker could receive weekly payments (known as the 'second entitlement period') was extended to 130 weeks in 2006.⁵⁵

48 Hunt et al (n 35) 4-51.

49 Peter Hanks, *Accident Compensation Act Review: Final Report* (Report, August 2008) 13 [53] ('Hanks Review'); Stylianou (n 10) 54.

50 Victorian WorkCover Authority, *Annual Report 2002* (October 2002) 7.

51 *Accident Compensation (Common Law and Benefits) Act 2000* (Vic); see generally Stylianou (n 10) 56-58; Hanks Review (n 49) 14 [56]-[61].

52 Stylianou (n 10) 58.

53 Stylianou (n 10) 60.

54 See definition of 'WorkSafe Victoria' in s 18A of the *Accident Compensation Act 1985* (Vic).

55 Hanks Review (n 49) 14 [59].

- 2.42. In 2008, Peter Hanks QC conducted a major independent review of the *Accident Compensation Act 1985* (Vic) and associated legislation.⁵⁶ The Hanks Review made a number of recommendations which led to some increases in benefits and significant reforms to return to work requirements.⁵⁷
- 2.43. The Hanks Review handed down its final report in 2008.⁵⁸ It made 151 recommendations, with four main areas of reform:
- better rehabilitation and return to work outcomes;
 - fair and accessible benefits;
 - greater accountability and transparency; and
 - improved understanding and usability of the legislation.⁵⁹
- 2.44. The government accepted most recommendations from the Hanks Review's recommendations. Recommendations that were not accepted included those relating to provisional liability, common law eligibility, significant changes to dispute resolution and oversight of the Accident Compensation Conciliation Service.
- 2.45. The accepted recommendations were incorporated into law through the *Accident Compensation Amendment Bill 2009*. The majority of these amendments came into effect on 5 April 2010 or 1 July 2010.⁶⁰
- 2.46. During this period, WorkSafe's claims handling procedures and processes were the subject of two investigations by the Victorian Auditor-General.⁶¹ The reports of those investigations are examined in Chapter 5.

A new Act—2013–2021

- 2.47. With effect from 1 July 2014, the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) (WIRC Act) repealed the *Accident Compensation (WorkCover Insurance) Act 1993* (Vic). It also streamlined the provisions of the *Accident Compensation Act 1985* (Vic). The Act did not make any changes to benefits and was intended to consolidate and simplify the existing law.

⁵⁶ Hanks Review (n 49).

⁵⁷ Hanks Review (n 49) ch 4; *Accident Compensation Amendment Act 2010* (Vic) pt 13; and see *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) pt 4.

⁵⁸ Hanks Review (n 49).

⁵⁹ Hanks Review (n 49) 9.

⁶⁰ *Accident Compensation Amendment Act 2010* (Vic) s 2.

⁶¹ Victorian Auditor-General's Office, *Management of claims by the Victorian WorkCover Authority* (Audit report, 2001) and Victorian Auditor-General's Office, *Claims Management by the Victorian WorkCover Authority* (Audit report, June 2009).

Improving the experience of injured workers

- 2.48. The objectives of the new Act are essentially the same as those which had been in force since the 1992 Act which replaced the WorkCare scheme with the WorkCover scheme.⁶²
- 2.49. By contrast to the periods examined above during which the workers' compensation legislation was amended on more than 100 occasions, the last eight years have been relatively quiet at least insofar as legislative change has been concerned.
- 2.50. The principal exceptions have been:
- the introduction of 'provisional payments' for medical expenses for mental injuries in advance of a claim being accepted by WorkSafe;⁶³ and
 - a further option for dispute resolution allowing the ACCS to arbitrate (make binding determinations) on workers' compensation disputes which are not resolved by conciliation.⁶⁴ These arbitration powers are intended to commence by 1 January 2023.
- 2.51. The provisional payment scheme and ACCS arbitration process are described in more detail in Chapter 3.
- 2.52. In 2016 and again in 2019, the Victorian Ombudsman investigated the management of complex workers' compensation claims and the oversight of that management by WorkSafe.⁶⁵ The reports of those investigations are examined in detail in Chapter 5.

⁶² See *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 10.

⁶³ See *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) div 10 pt 5 as inserted by the *Workplace Injury Rehabilitation and Compensation Amendment (Provisional Payments) Act 2021* (Vic) s 11.

⁶⁴ *Workplace Injury Rehabilitation and Compensation Amendment (Arbitration) Bill 2021* cl 35 (to insert new section 301C in the WIRC Act).

⁶⁵ Victorian Ombudsman 2016 (n 2) and Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019).

3. Current legislative structure

'The only hope you have in the system is to have a law degree to navigate the system for any hope of a reasonable experience'

'Jessica', injured worker

Key points

- The Victorian workers' compensation scheme is governed by the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) and associated regulations, guidelines, directions and compliance codes.
- Injured workers may be entitled to compensation for:
 - medical and like expenses and lost earnings for injuries or illnesses sustained in the course of employment.
 - a lump sum payment for non-economic loss and 'common law' damages if the injury results in a permanent or serious injury.
- The process for a worker to dispute a decision to reject or terminate a claim can be complex. Claims for mental health injuries and decisions on a worker's 'current work capacity' are particularly complicated and give rise to many disputes.

Purpose of the chapter

- 3.1. The purpose of this chapter is to provide an overview of the legislative and policy framework of the Victorian workers' compensation system, including:
- entitlements for workers and the process for making claims;
 - return to work responsibilities and obligations of workers and employers; and
 - the dispute resolution process.

Current legal structure

The WIRC Act

- 3.2. The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('WIRC Act') governs Victoria's workers' compensation system. The *Accident*

Compensation Act 1985 (Vic) continues to apply in respect of injuries or deaths arising from accidents and diseases in the workplace before 1 July 2014.¹

- 3.3. Associated legislation and policy, such as the *Workplace Injury Rehabilitation and Compensation Regulations 2014*, Ministerial Guidelines and Ministerial Directions set out detailed policy and administrative matters.
- 3.4. The WIRC Act came into operation on 1 July 2014. The Act largely replaced the *Accident Compensation Act 1985* (Vic) which had governed Victoria's workers' compensation scheme since the introduction of the 'WorkCare scheme' in 1985. The WIRC Act was intended to 'make it easier for employers and workers to use the legislation and understand their rights, obligations and responsibilities'.²
- 3.5. The WIRC Act provides the framework for:
 - decisions about a worker's claim; and
 - the respective roles, rights and duties of the worker, employer, WorkSafe Victoria and others.
- 3.6. The objectives of the WIRC Act are to:
 - reduce the incidence of accidents and diseases in the workplace; and
 - make provision for the effective occupational rehabilitation of injured workers and their early return to work; and
 - increase the provision of suitable employment to workers who are injured to enable their early return to work; and
 - ensure appropriate compensation under this Act or the *Accident Compensation Act 1985* is paid to injured workers in the most socially and economically appropriate manner, as expeditiously as possible; and
 - ensure workers compensation costs are contained so as to minimise the burden on Victorian businesses; and
 - establish incentives that are conducive to efficiency and discourage abuse; and
 - enhance flexibility in the system and allow adaptation to the particular needs of disparate work situations; and
 - maintain a fully-funded scheme; and

¹ *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 1(b) ('WIRC Act').

² Victorian WorkCover Authority, *A Guide to the Workplace Injury Rehabilitation and Compensation Act 2013* (Victorian WorkCover Authority, 2014) 1.

Improving the experience of injured workers

- in this context, to improve the health and safety of persons at work and reduce the social and economic costs to the Victorian community of accident compensation..³
- 3.7. The enactment of the WIRC Act was a key recommendation of the Hanks Review..⁴ The Hanks Review recommended that the new Act should be '...arranged in a logical, intelligible and functional structure... that eliminates obsolete and contradictory provisions'..⁵
- 3.8. Despite the aim to simplify the legislation, it is apparent that workers and employers still struggle to navigate their rights and entitlements. Submissions to the Review have emphasised that particularly for an injured worker, the current workers' compensation legal and policy framework is complex, adversarial and a source of frustration..⁶

Other applicable legislation

- 3.9. WorkSafe and its agents must also comply with:
- any directions or guidelines issued pursuant to the WIRC Act by the responsible Minister;
 - the *WIRC Regulations 2014* (Vic);
 - the *Occupational Health and Safety Regulations 2017* (Vic);
 - the Charter of Human Rights and Responsibilities Act 2006 (Vic); and
 - the Victorian Government Model Litigant Guidelines.
- 3.10. Employers and workers must comply with relevant provisions in the WIRC Act, as well as with other legislation including:
- any directions or guidelines issued pursuant to the WIRC Act by the responsible Minister;
 - the WIRC Regulations 2014 (Vic);
 - the *Occupational Health and Safety Act 2004* (Vic);
 - the *Occupational Health and Safety Regulations 2017* (Vic);
 - the *Equal Opportunity Act 2010* (Vic); and

3 WIRC Act s 10.

4 Peter Hanks, *Accident Compensation Act Review: Final Report* (Report, August 2008) ('Hanks Review').

5 Hanks Review (n 4) 40.

6 See, eg, Submissions DP26 (██████████), DP40 (██████████), DP51 (Uniting Victoria), DP54 (VTHC); Consultations 1 (Roundtable with medical and rehabilitation provider peak bodies), 2 (Roundtable with WorkSafe agents), 8 (Roundtable with union group 1), 19 (Injured workers' online discussion 1).

- the *Disability Discrimination Act 1992* (Cth).

Who has entitlements and in what circumstances?

Workers' entitlement to compensation

3.11. The WIRC Act defines a worker as:

an individual—

(a) who—

- (i) performs work for an employer; or
- (ii) agrees with an employer to perform work—

at the employer's direction, instruction or request, whether under a contract of employment (whether express, implied, oral or in writing) or otherwise; or

(b) who is deemed to be a worker under this Act.⁷

3.12. A worker may be entitled to compensation for an injury 'arising out of or in the course of any employment'.⁸ Injuries covered by the WIRC Act include physical and mental injuries, diseases and industrial deafness.⁹

3.13. For most types of injury, workers may be entitled to compensation if their work has contributed to the injury occurring, to any extent. If the injury occurred by way of 'gradual process over time', a worker may be eligible for compensation if the gradual process injury was due to the nature of employment in which the worker was employed.¹⁰

3.14. If the worker's injury is attributable to the worker's serious and wilful misconduct, the worker will not be entitled to compensation unless the injury is severe or results in death.¹¹

⁷ WIRC Act s 3. See also WIRC Act sch 1 pt 1 which deems some people to be workers.

⁸ WIRC Act s 39(1).

⁹ WIRC Act s 3. Generally speaking, there is a distinction between injuries in the primary sense and injuries in the nature of diseases. See *Zickar v MGH Plastic Industries Pty Ltd* (1996) 187 CLR 310, 332; *Military Rehabilitation and Compensation Commission v May* (2016) 257 CLR 468, 480–481, 486.

¹⁰ WIRC Act s 39(3).

¹¹ WIRC Act ss 40(5)–40(6).

Special rules for mental injuries

The 'reasonable management action' carve-out

3.15. Claims for mental injuries are treated differently to claims for physical injuries. A worker with a mental injury is not eligible for compensation if the mental injury was caused wholly or predominantly by 'management action taken on reasonable grounds in a reasonable manner' by or on behalf of their employer.¹²

3.16. Management action includes:

- a) appraisal of the worker's performance;
- b) counselling or disciplinary action;
- c) suspension or stand-down of the worker's employment;
- d) transfer, demotion, redeployment or retrenchment of the worker;
- e) dismissal of the worker;
- f) reclassification of the worker's employment position;
- g) provision of leave of absence to the worker;
- h) training a worker in respect of the worker's employment;
- i) investigation by the worker's employer of any alleged misconduct:
 - o of the worker; or
 - o of any other person relating to the employer's workforce in which the worker was involved or to which the worker was a witness; or
- j) communication in connection with an action mentioned in any of the above paragraphs.¹³

3.17. A decision about whether a mental injury was 'caused by' management action involves difficult judgements. The agent must determine the specific cause or causes of the worker's injury and there is considerable scope for disputation and complexity especially if, as is often the case, there is conflicting medical evidence on the question. The difficulty of determining the causal connection between management action and an injury is illustrated through its consideration by various courts, including the High Court of Australia.¹⁴

¹² WIRC Act s 40(1).

¹³ WIRC Act s 40(7).

¹⁴ See *Comcare v Martin* (2016) HCA 43. The High Court held that whether a mental injury was 'caused by' reasonable management action is not determined by the worker's subjective perception of the impact of the action. The causal connection is met if, in the absence of the administrative action, the worker would not have suffered the mental injury that arose in the course of employment.

- 3.18. The complexity in determining liability for claims for mental injury may have contributed to the comparatively high rate of rejection of mental injury claim. Historically, WorkSafe rejected nearly half of all mental health injury claims.¹⁵

Provisional payments for mental injuries

- 3.19. Significant changes to how mental injury claims are dealt with will soon be implemented in Victoria. These changes belatedly implement a recommendation by the 2008 Hanks Review.¹⁶
- 3.20. Recent amendments to the workers' compensation scheme provide for 'provisional liability payments' for workers with mental injury claims. Workers with mental injury claims will be entitled to compensation for the reasonable costs of medical treatment relating to the injury for up to 13 weeks. Provisional payments are made prior to a claim decision or even where the claim is rejected.¹⁷
- 3.21. The government intends that eligible workers will be able to access these payments from 1 July 2021, or at the latest 1 January 2022.¹⁸
- 3.22. The assumption for all claims for mental injury will be that claims are valid unless there is evidence to the contrary. Any Victorian worker who makes a claim that includes a mental injury will be eligible to access provisional payments.¹⁹
- 3.23. It is intended that providing rejected claimants with up to 13 weeks support for medical treatment through provisional payments will assist injured workers whose claim is:
- initially rejected due to insufficient medical evidence but subsequently accepted;
 - rejected, and who choose to dispute this through conciliation; or

15 In October 2015, 44.5% of police mental health claims were rejected, compared to just 4.7% of claims involving physical injuries: Nick McKenzie, Richard Baker and Nick Toscano, 'Dirty tactics by insurance companies make injured workers miserable', *The Age* (online, 16 September 2016) <<https://www.theage.com.au/national/victoria/dirty-tactics-by-insurance-companies-make-injured-workers-miserable-20160909-grd648.html>>.

16 See Hanks Review (n 4) 108-111, rec 12. Hanks recommended the introduction of provisional liability together with a streamlined injury notification process, but considered that provisional liability for 'stress claims' should be 'guided by the scheme's experience'.

17 *Workplace Injury Rehabilitation and Compensation Amendment (Provisional Payments) Act 2021* (Vic) s 263.

18 WorkSafe Victoria, 'Victoria's New Provisional Payments for Work-Related Mental Injuries' (Web Page, 25 February 2021) <<https://www.worksafe.vic.gov.au/victorias-new-provisional-payments-work-related-mental-injuries>>. The Act has not yet been proclaimed.

19 WorkSafe Victoria, Victoria's New Provisional Payments for Work-Related Mental Injuries (n 18).

- rejected, to return to work and transition to the public health system, and ensure they are not arbitrarily cut off from receiving access to treatment and support.²⁰

What is the process to establish entitlements?

3.24. An injured worker may lodge a claim for:

- medical treatment and associated expenses; or
- weekly compensation if the worker is unable to do their normal work (described as an 'incapacity').

3.25. A worker who sustains a workplace injury and wishes to receive compensation, must:

- notify their employer within 30 days of becoming aware of the injury;²¹
- lodge a claim with the employer, the employer's agent, or WorkSafe, as soon as practicable if the worker is unable to perform normal work duties, or within six months if the claim is for medical expenses only;²² and
- provide a 'certificate of capacity' from a registered treating health practitioner if the claim is for weekly payments. Certificates must continue to be provided during the claim period.²³

3.26. Workers may lodge a claim in person or by post, fax or email.²⁴

3.27. Upon receiving a claim, an employer must:

- forward the claim for weekly payments or a claim for medical and like expenses that will exceed the employer's excess, to WorkSafe (or its agent) within 10 days;²⁵
- forward the medical certificate in support of a claim for weekly payments to WorkSafe (or its agent) within 10 days;²⁶ and
- forward information regarding a claim that has fallen within the employer's excess and which has been paid by the employer within timeframes specified by WorkSafe.²⁷

20 WorkSafe Victoria, Victoria's New Provisional Payments for Work-Related Mental Injuries (n 18). A significant number of workers who have had their mental injury claim rejected receive some form of compensation at conciliation.

21 WIRC Act s 18.

22 WIRC Act s 20.

23 WIRC Act s 167.

24 *Ministerial Guidelines-Claim for Compensation 2016* (Vic) cl 6.

25 WIRC Act s 73(1).

26 WIRC Act s 73(1).

27 WIRC Act s 73(2).

- 3.28. Employers may forward a claim by posting, faxing or emailing the claim to their agent or WorkSafe.²⁸
- 3.29. The introduction of 'provisional payments' will impose shorter timeframes on employers to forward claims for mental injuries. Employers will be required to notify WorkSafe (or its agent) of a mental injury claim within three business days of receiving it.²⁹
- 3.30. Employers who fail to comply with the timeframes for forwarding claims or medical certificates can incur penalties of up to 60 penalty units for a natural person or 300 penalty units for a body corporate.³⁰ One penalty unit is currently \$165.22.³¹
- 3.31. An injured worker's claim is managed by an agent which acts on behalf of WorkSafe in determining liability.³²
- 3.32. WorkSafe/the agent must determine whether to accept a worker's claim within 28 days of receiving the claim, and provide written notice to the worker.³³ Failure to make a decision within the 28 day timeframe can result in the worker's claim being deemed as accepted.³⁴
- 3.33. The employer may lodge an objection to a decision to accept a claim. This must occur within 60 days of them receiving notice of the decision to accept the claim. Objections may only be lodged on two specific grounds:
- the alleged worker is not a worker within the meaning of the WIRC Act; or
 - the employer was not the correct employer of the worker at the time of the injury.³⁵

28 Ministerial Guidelines-Claim for compensation 2016 (Vic) cl 7.

29 Workplace Injury Rehabilitation and Compensation Amendment (Provisional Payments) Act 2021 (Vic) s 7 (introducing new section 73A to the WIRC Act).

30 WIRC Act s 73(1).

31 Department of Justice and Community Safety, 'Penalties and values' (Web Page, 8 July 2020) <<https://www.justice.vic.gov.au/justice-system/fines-and-penalties/penalties-and-values>>.

32 The role of agents is examined in detail in Chapter 4.

33 WIRC Act s 75.

34 WIRC Act ss 75(4) and (5).

35 WIRC Act s 79.

What are the entitlements and who pays?³⁶

Medical and like expenses

3.34. Eligible injured workers may receive compensation for the reasonable costs of medical and like services. These services include road accident rescue, medical, hospital, nursing, personal and household, occupational rehabilitation and ambulance services.³⁷

3.35. Entitlement to compensation for medical and like services ends:

- 52 weeks after the entitlement to weekly payments ceases, subject to some exceptions; or
- 52 weeks after the occurrence of the compensable injury, if the claim was only for medical and like services, subject to some exceptions.³⁸

Weekly payments

3.36. Injured workers who are unable to work as a result of a work injury are eligible to receive weekly compensation payments equivalent to up to 95 per cent of their pre-injury average weekly earnings for the first 13 weeks of the claim.³⁹ The first 13 weeks of weekly payments is known as the 'first entitlement period'.⁴⁰

3.37. After the first entitlement period has expired, weekly compensation payments decrease to the lesser of:

- 80 per cent of the injured worker's pre-injury average weekly earnings; or
- twice the State average weekly earnings.⁴¹

3.38. The period after a worker has received more than 13 weeks of weekly payments until 130 weeks is known as the 'second entitlement period'.⁴²

3.39. A worker's entitlement to weekly payments ceases after 130 weeks, unless:

- the worker is assessed by an agent as having no current work capacity and is likely to have no work capacity indefinitely;⁴³ or

36 A description of self-insurers is provided below. Generally, the chapter does not describe the requirements of the WIRC Act as it relates to self-insurers.

37 WIRC Act s 224.

38 WIRC Act s 232.

39 WIRC Act s 161.

40 WIRC Act s 152.

41 WIRC Act s 162.

42 WIRC Act s 152.

43 WIRC Act s 163.

Improving the experience of injured workers

- the agent is satisfied, on the application of the worker, that the worker has a current work capacity and has:
 - returned to work for a period of not less than 15 hours per week; and
 - is in receipt of current weekly earnings of at least \$177 per week; and
 - because of the injury, the worker is, and is likely to continue indefinitely to be, incapable of undertaking further additional employment or work which would increase the worker's current weekly earnings;⁴⁴ or
- The worker has a current work capacity and has returned to work, and requires time off work to have surgery in relation to their work-related injury.⁴⁵

Determining 'no current work capacity'

- 3.40. Before a worker reaches the end of the second entitlement period, the agent must review the claim to determine if the worker's entitlement to weekly payments will continue past the second entitlement period.⁴⁶
- 3.41. An agent must base its decision on medical evidence which specifically comments on the worker's capacity for work.⁴⁷ To enable the agent to make this assessment, they generally require an injured worker to be examined by an Independent Medical Examiner (IME).⁴⁸ An IME must be approved by WorkSafe and may be a:
- medical practitioner; or
 - registered dentist, physiotherapist, chiropractor, osteopath or psychologist.⁴⁹
- 3.42. IMEs must meet WorkSafe selection criteria and must comply with service standards.⁵⁰
- 3.43. IMEs may provide:
- medico-legal reports about injured workers, commenting on diagnosis, capacity, function, and treatment, and
 - opinions on whether a worker's condition or incapacity is work related to inform agent entitlement decisions.

44 WIRC Act s 165(4).

45 WIRC Act s 164.

46 WorkSafe Victoria, 'Claims Manual' (Web Page, 2020) pt 3.3.4 <www1.worksafe.vic.gov.au/wva/claimsmanual/Home.htm> ('WorkSafe Claims Manual').

47 WorkSafe Claims Manual (n 46) pt 3.3.4.

48 WIRC Act s 27(1).

49 WIRC Act s 27(5).

50 WorkSafe Victoria, *Information for Injured Workers: Independent Medical Examinations* (Brochure, undated).

Improving the experience of injured workers

- 3.44. An agent will typically ask the IME to answer a series of questions in a written report.⁵¹
- 3.45. A worker is regarded as having 'no current work capacity' if the worker has '...a present inability arising from an injury such that the worker is not able to return to work, either in the worker's pre-injury employment or in suitable employment'..⁵²
- 3.46. Agents can only stop making payments to a worker post-130 weeks on the grounds that the worker's lack of current work capacity is not an 'indefinite' incapacity, if the following apply:
- medical opinion confirms that the worker will have a capacity for suitable employment in the foreseeable future;
 - the normal or expected course of recovery is that the worker will have a capacity for suitable employment based on evidence-based clinical practice and/or previous experience;
 - the duration of the worker's current incapacity can be defined and is proximate;
 - there are reasons why the worker will gain a capacity for suitable employment, such as recovering from surgery; and
 - there is consistent information supporting the change of capacity..⁵³
- 3.47. A worker who has a current work capacity and is, or has been, receiving weekly payments, may apply for a determination that their entitlement to weekly payments will not cease at 130 weeks..⁵⁴ The worker may do this at any time. WorkSafe must notify the worker of its decision to approve or reject the application within 28 days of receiving the application..⁵⁵
- 3.48. Workers who do not agree with WorkSafe's/the agent's decision can dispute the decision as detailed at 3.90.

51 WorkSafe Victoria, 'Guide for Independent Medical Examination Reports' (Web Page, 22 January 2020)

<www.worksafe.vic.gov.au/guide-independent-medical-examination-reports>.

52 WIRC Act s 3 (definition of 'no current work capacity').

53 WorkSafe Claims Manual (n 46) pt 3.3.4.

54 WIRC Act s 165.

55 WIRC Act s 165(3).

'The system is all about getting people off WorkCover, which I understand as well. But I don't think it should be done this way, especially if there is little consideration taken into the situation of the individual'

'Claire', partner of injured worker

Payments for permanent impairment

- 3.49. An injured worker who sustains a permanent injury may also make a claim for an additional lump sum payment of compensation for non-economic loss.⁵⁶ Such a payment is known as an 'impairment benefit'.
- 3.50. A worker's level of permanent impairment caused by an injury is assessed as a percentage figure. The value of the impairment benefit payable is then calculated based on a formula set out in the WIRC Act.⁵⁷
- 3.51. This compensation is known as a 'non-economic loss' payment, as it is awarded irrespective of a worker's loss of income.

Common law damages for serious injuries and death benefits

- 3.52. Workers with a permanent impairment of 30% or greater, or who otherwise suffer a 'serious' injury, may also be eligible to make a claim for damages at common law.⁵⁸ A worker who does not have a permanent impairment of 30% or greater must lodge a serious injury application before initiating a claim for common law damages.⁵⁹
- 3.53. Decisions about whether an injury is 'serious' take into account the consequences of the injury for the worker. Consideration is given to both the worker's pain and suffering and their loss of earning capacity. The consequences of the injury must be regarded as 'more than significant or marked, and as being at least very considerable'.⁶⁰

⁵⁶ WIRC Act s 211.

⁵⁷ WIRC Act s 211(2).

⁵⁸ WIRC Act s 327.

⁵⁹ WIRC Act ss 328(1)–(3).

⁶⁰ WIRC Act s 325 (definition of serious injury).

- 3.54. If either WorkSafe or the County Court determines that a worker has sustained a serious injury, the worker may issue common law proceedings alleging that the employer's negligence caused the worker's injury.
- 3.55. If the employer is found to have been negligent, the worker may be awarded compensation for both pain and suffering and economic loss. Economic loss covers loss of past and future earnings. A worker who is awarded or receives compensation through a common law settlement with WorkSafe will no longer be entitled to ongoing weekly payments or medical expenses for that injury.⁶¹
- 3.56. WorkSafe provides a number of payments to the family and dependants of workers who die as the result of a work-related injury or illness. Dependent partners and children are entitled to a share of a lump sum payment.⁶² They are also entitled to a weekly pension payment at an amount and for a timeframe specified by the WIRC Act.⁶³

Who is responsible for paying compensation?

- 3.57. Both WorkSafe and the employer are directly liable to pay compensation and damages for injuries arising out of, or in the course of, or due to the nature of, employment.⁶⁴
- 3.58. Employers are usually required to pay the first 10 days of weekly compensation for each injured worker's claim, and the first \$642 of reasonable medical and associated costs.⁶⁵ The amount of 'employer excess' payable may be increased, decreased or eliminated by the employer paying an adjusted amount of premium in accordance with guidelines made by WorkSafe.⁶⁶ WorkSafe generally indemnifies employers for compensation or payments payable under the WIRC Act for amounts exceeding the employer's 'excess'.⁶⁷

Compulsory insurance

- 3.59. Employers paying more than \$7500 in annual wages must have a WorkCover insurance policy with a WorkCover agent.⁶⁸

⁶¹ WIRC Act s 347.

⁶² WIRC Act ss 236, 237.

⁶³ WIRC Act s 241.

⁶⁴ WIRC Act s 70.

⁶⁵ WIRC Act s 72(1).

⁶⁶ WIRC Act s 72(6).

⁶⁷ WIRC Act ss 71 and 72.

⁶⁸ WorkSafe Victoria, 'Do I Need to Register for WorkCover Insurance?' (Web Page, 25 August 2020)

<<https://www.worksafe.vic.gov.au/do-i-need-register-workcover-insurance>>.

Improving the experience of injured workers

- 3.60. WorkCover Insurance is compulsory business insurance to cover costs if a worker is hurt or becomes unwell because of their work.⁶⁹ Premiums for WorkCover Insurance are set by WorkSafe and gazetted annually.⁷⁰
- 3.61. Employers select which of WorkSafe's agents will manage their WorkCover insurance policy and any claims lodged by their workers. Injured workers cannot select who manages their claim.
- 3.62. WorkSafe indemnifies an employer from liability to pay compensation and damages under the WIRC Act (or a corresponding provision of an Act in another Australian jurisdiction). The indemnity covers injuries suffered by the worker arising out of, or in the course of, or due to the nature of employment by the employer.⁷¹
- 3.63. WorkSafe and its agents act in place of the employer to decide the eligibility of claims and in any legal actions arising from disputes under the WIRC Act.⁷²
- 3.64. Generally speaking, employers are able to change agents once every 12 months. However, as the result of the COVID-19 pandemic, WorkSafe declared a 'freeze' on employers changing agents between 1 July 2020 and 30 September 2021.⁷³

Self-insurance

- 3.65. WorkSafe approves some large employers to act as 'self-insurers'.⁷⁴ Self-insurers manage and underwrite their own workers' compensation claims and are not part of the agent model.⁷⁵
- 3.66. In order for an employer to be approved as a self-insurer, WorkSafe must determine that the employer is 'fit and proper' to be a self-insurer. In deciding if an employer is 'fit and proper' WorkSafe considers factors including the business' financial liabilities, resources for claims administration, the incidence of workplace injuries and the safety of workers' working conditions.⁷⁶

69 WorkSafe Victoria, 'Do I Need to Register for WorkCover Insurance?' (n 68).

70 WIRC Act s 448.

71 WIRC Act s 71(1).

72 WIRC Act ss 71(3), 71(4).

73 WorkSafe Victoria, 'Employer Transfer Freeze Policy 2020' (Web Page, 22 December 2020)

<<https://www.worksafe.vic.gov.au/employer-transfer-freeze-policy-2020>>.

74 WIRC Act pt 8, in particular ss 375-376, 379.

75 WIRC Act ss 379-380, 392.

76 WIRC Act s 379.

- 3.67. Self-insurers are subject to terms and conditions set out in a Ministerial Order as well as terms and conditions determined by WorkSafe.⁷⁷
- 3.68. As at 30 June 2020, there were 40 self-insurers operating in Victoria, representing about 7% of the total scheme remuneration.⁷⁸

The life of a claim

Return to work obligations

- 3.69. WorkSafe's legislated functions include promoting the effective rehabilitation of injured workers and their early return to work.⁷⁹ However, the practical legislated obligations for returning workers to employment focus primarily on employers and workers.

Responsibilities of employers

- 3.70. Employers, including self-insurers, are obliged to provide injured workers with suitable or pre-injury employment for the duration of the 'employment obligation period' but only 'to the extent that it is reasonable to do so'.⁸⁰ Employers must also plan for the return to work of their injured workers.⁸¹
- 3.71. The 'employment obligation period' applies for an aggregate period of 52 weeks during which the worker has an incapacity for work. The 52 weeks begins on the earliest of the following dates when the employer:
- receives a medical certificate from the worker;
 - receives a claim for compensation from the worker;
 - is notified by WorkSafe that the worker has made a claim; or
 - is notified by WorkSafe that the worker has given WorkSafe a medical certificate.⁸²
- 3.72. Some exclusions apply to the obligation period. The obligation period does not include any period between WorkSafe or a self-insurer rejecting a claim, and that decision being overturned by the Accident Compensation Conciliation Service,

77 WIRC Act s 380.

78 WorkSafe Victoria, *Annual Report 2020* (Report, October 2020) 54.

79 WIRC Act s 493(d). See also s 493(e).

80 WIRC Act s 103.

81 WIRC Act s 104.

82 WIRC Act s 96(1).

- the court or WorkSafe. Any period during which a Return to Work improvement notice issued to the employer is put on hold by WorkSafe is also excluded.⁸³
- 3.73. 'Suitable employment' is work for which the worker is currently suited when they cannot yet return to their pre-injury employment. It may include modified duties, alternate duties, or reduced hours.⁸⁴
- 3.74. Employers who fail to comply with the obligation to provide suitable or pre-injury employment may be penalised up to 180 penalty units for a natural person or 900 penalty units for a body corporate.⁸⁵
- 3.75. Employers are also required to take steps to assist a worker to return to work including:
- planning a worker's return to work, e.g. considering the worker's capacity for work and any reasonable modifications, support or assistance the worker may require;⁸⁶
 - consulting, to the extent it is reasonable to do so, with the worker, the worker's treating health practitioner, and any relevant occupational rehabilitation provider;⁸⁷ and
 - appointing a return to work co-ordinator.⁸⁸
- 3.76. Employers also have a duty under the *Equal Opportunity Act 2010* (Vic) to make 'reasonable adjustments' for an employee with a 'disability' where such adjustments are required in order for the employee to 'perform the genuine and reasonable requirements of the employment'.⁸⁹
- 3.77. Large employers (those with a rateable remuneration exceeding \$2,169 670, indexed annually) must ensure that an appropriate person is appointed as a return to work co-ordinator at all times. Smaller employers must appoint an appropriate person as a return to work co-ordinator for periods when the employer is obliged to provide suitable employment to a specific worker who has an incapacity for work.⁹⁰

83 WIRC Act s 103(3).

84 WIRC Act s 3.

85 WIRC Act s 103(1).

86 WIRC Act s 104.

87 WIRC Act s 105.

88 WIRC Act s 106.

89 See *Equal Opportunity Act 1995* (Vic) s 20(2) as interpreted in *Dziurbas v Mondelez Australia Pty Ltd* [2015] VCAT 143 and *Butterworth v Independence Australia Services* [2015] VCAT 2056. See also the similar requirements imposed by the *Disability Discrimination Act 1992* (Cth) as explained by the Federal Court of Australia in *Watts v Australia Postal Corporation* (2014) 222 FCR 220 at [23]-[24].

90 WIRC Act s 106.

Improving the experience of injured workers

- 3.78. An appropriate person means ‘a person who has an appropriate level of seniority and is competent to assist an employer to meet the return to work obligations of the employer’.⁹¹ They must have knowledge, skills or experience relevant to planning for return to work.⁹²
- 3.79. Some other states, such as Queensland, require return to work co-ordinators to have completed a training course approved by the workers' compensation regulator.⁹³
- 3.80. Most of the detailed requirements relating to return to work are set out in four return to work compliance codes approved by the Minister.⁹⁴
- 3.81. Compliance Code 1 provides that agents can provide employers with guidance about return to work planning and providing suitable or pre-injury employment. They can also make referrals to services which will assist the employer to meet their obligations, such as assessment of the worker by an occupational physician.⁹⁵

WorkSafe’s role

- 3.82. WorkSafe is authorised to direct an employer to use an approved occupational rehabilitation provider to advise and assist the employer about their return to work obligations. While WorkSafe is authorised to make such directions, it is not required to do so.⁹⁶
- 3.83. WorkSafe employs ‘return to work inspectors’ with the intention of ensuring employers comply with their return to work obligations.⁹⁷ If a return to work inspector considers an employer is not meeting its return to work obligations, the inspector can issue an improvement notice to the employer. The improvement notice specifies how the employer can comply and the date by which they must comply.⁹⁸

91 WIRC Act ss 106(6).

92 WIRC Act ss 106(7).

93 *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 41.

94 WIRC Act s 121.

95 WorkSafe Victoria, *Compliance Code 1 of 4: Providing Employment, Planning and Consultation about Return to Work* (2nd edition, December 2019) 7.

96 WIRC Act s 120.

97 WorkSafe Victoria, *Information about Return to Work Inspectors: Helping Injured Workers Get Back to Work* (Information booklet, July 2013) 1.

98 WIRC Act ss 136, 137.

3.84. In some other jurisdictions, there are mandated return to work requirements on the body that performs the equivalent function to WorkSafe. For example, in South Australia the legislation mandates that the 'Return to Work Corporation of South Australia' must take various steps in relation to returning injured workers to work. This includes developing and maintaining plans or strategies with the objective of:

- ensuring early and timely intervention occurs to improve recovery and return to work outcomes including after retraining (if required); and
- achieving timely, evidence-based decision-making that is consistent with the requirements of the legislation; and
- wherever possible, providing a face to face service where there is a need for significant assistance, support or services; and
- ensuring regular reviews are taken in relation to a worker's recovery and, where possible, return to work; and
- ensuring the active management of all aspects of a worker's injury and any claim; and
- encouraging an injured worker and his or her employer to participate actively in any recovery and return to work processes; and
- minimising the risk of litigation.⁹⁹

3.85. The South Australian Corporation is also required to take reasonable steps to ensure that a reasonable level of recovery and return to work services are provided to an injured worker. It must also take reasonable steps to ensure that the recovery and return to work services will be provided by persons accredited, approved or appointed by the corporation.¹⁰⁰

3.86. In Queensland, the statutory authority insurer, WorkCover Queensland is responsible for helping employers put together a rehabilitation and return to work plan.¹⁰¹

Responsibilities of workers

3.87. Injured workers' obligations in relation to returning to work include:

⁹⁹ *Return to Work Act 2014 (SA)* s 13(2).

¹⁰⁰ *Return to Work Act 2014 (SA)* ss 24(4), 24(5).

¹⁰¹ WorkSafe Queensland, 'Other Roles in your Rehabilitation' (Web Page, 10 September 2020)

<www.worksafe.qld.gov.au/rehabilitation-and-return-to-work/recovering-from-injury-or-illness/rehabilitation-roles-and-responsibilities/other-roles-in-your-rehabilitation>.

Improving the experience of injured workers

- attending medical examinations with an Independent Medical Examiner at reasonable intervals;¹⁰² and
 - making 'reasonable efforts' to return to work while they have an incapacity for their normal work.¹⁰³
- 3.88. A worker with an incapacity to work must also participate in:
- assessments of capacity, rehabilitation progress and future employment prospects if reasonably requested by the employer, self-insurer or agent;¹⁰⁴ and
 - occupational rehabilitation services under their return to work obligations.¹⁰⁵
- 3.89. Workers who fail to participate in an assessment or rehabilitation services to the extent that is 'reasonable' may have their entitlement to weekly benefits suspended or terminated.¹⁰⁶

Dispute resolution process

- 3.90. If a worker is unhappy with a decision regarding a claim or entitlement to compensation the worker can dispute the decision by initiating:
- review by an agent senior manager (optional);
 - conciliation by the Accident Compensation Conciliation Service;
 - independent review by WorkSafe Victoria's Workers' Compensation Independent Review Service;¹⁰⁷ and
 - proceedings in the Magistrates' Court or the County Court.¹⁰⁸
- 3.91. The current complex dispute management process (excluding the intended future arbitration process) is illustrated in Figure 2.¹⁰⁹

102 WIRC Act s 27.

103 WIRC Act s 114.

104 WIRC Act s 113.

105 WIRC Act s 112.

106 WIRC Act s 116.

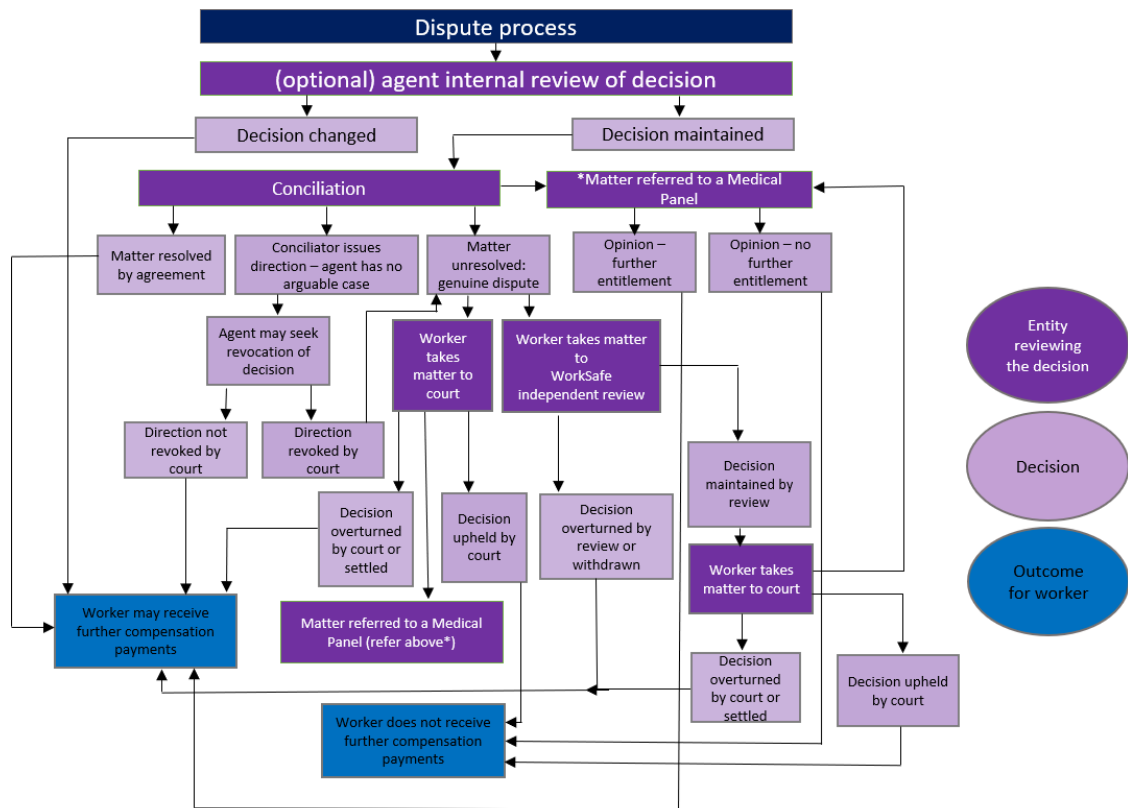
107 WorkSafe Victoria, 'What you need to know about a Workers Compensation Independent Review' (Web Page, 7 December 2020)

<<https://www.worksafe.vic.gov.au/what-you-need-to-know-about-workers-compensation-independent-review>>.

108 WIRC Act s 280, Flow chart 7; WorkSafe Claims Manual (n 46) ch 7.

109 Adapted from Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019) 25 ('Victorian Ombudsman 2019'). This is a high-level perspective of the dispute process and does not describe every avenue for decision-making.

Figure 2: The dispute management process



- The Victorian Government is currently implementing the Victorian Ombudsman’s recommendation to introduce a new dispute resolution process which allows for binding determinations on the merits of claim decisions. It is not clear where this will fit in the overall dispute process.

Conciliation

- 3.92. A worker disputing a decision about their claim for compensation can request the Accident Compensation Conciliation Service ('ACCS') to conciliate the dispute. The ACCS is a statutory authority. Its functions include providing independent conciliation services for the purposes of the WIRC Act in an expeditious, consistent, transparent and accountable manner.¹¹⁰
- 3.93. Conciliation at ACCS brings together all the parties to a workers’ compensation dispute. The process is intended to be efficient, transparent and accountable.¹¹¹ The service is free for injured workers.

110 WIRC Act s 522.

111 WIRC Act s 522.

Improving the experience of injured workers

- 3.94. Each dispute is assigned to a conciliation officer who acts as an independent third party. Where a matter cannot be resolved by agreement between the parties, conciliation officers may:
- make recommendations to the parties;
 - refer medical questions to a Medical Panel, which are described at 3.109; or
 - issue a certificate that a 'genuine dispute with respect to liability for payment of compensation' exists. This allows the worker to proceed to court. A 'genuine dispute' occurs if ACCS is satisfied that there is an arguable case for the agent to deny liability for compensation payments.¹¹²
- 3.95. In 2019-20, there were 11,225 disputes referred for conciliation. For disputes involving agents, there was a 64.5 per cent resolution rate (and 63.7 per cent resolution rate for self-insurers).¹¹³ Resolved disputes include matters that are resolved by agreement between the parties at conciliation or by direction from a conciliation officer, or are withdrawn.¹¹⁴
- 3.96. A further option for dispute resolution is to be introduced within the next two years. The ACCS will be allowed to arbitrate (make binding determinations) for workers' compensation disputes which are not resolved by conciliation.¹¹⁵ This gives effect to Recommendation 2 of the Victorian Ombudsman's 2019 report that the Victorian Government develop a new dispute resolution process.¹¹⁶ These arbitration powers are intended to commence by 1 January 2023.¹¹⁷

Review by the Workers' Compensation Independent Review Service

- 3.97. The Workers' Compensation Independent Review Service ('WCIRS') was established by WorkSafe on 30 April 2020 in response to Recommendation 3 of the 2019 Ombudsman report.¹¹⁸
- 3.98. This administrative service, which is not governed by legislation, enables a worker who is not satisfied with an agent's 'reviewable decision'¹¹⁹ to have that decision reviewed by WorkSafe. Reviewable decisions are limited to decisions that relate

112 WIRC Act ss 294-298.

113 Accident Compensation Conciliation Service, *Annual Report 2019-20* (Report, 26 August 2020) 6.

114 Accident Compensation Conciliation Service (n 113) 15.

115 *Workplace Injury Rehabilitation and Compensation Amendment (Arbitration) Bill 2021* cl 35 (to insert new section 301C in the WIRC Act).

116 Victorian Ombudsman 2019 (n 109) 240.

117 *Workplace Injury Rehabilitation and Compensation Amendment (Arbitration) Bill 2021* cl 2.

118 WorkSafe Victoria, 'What You Need to Know About a Workers Compensation Independent Review' (Web Page, 2020) ('WCIRS Web Page').

119 WCIRS Web Page (n 118).

to accepting or rejecting liability for a claim, calculation and payments of weekly compensation, workers' current work capacity and payment of medical and like expenses.¹²⁰

3.99. The WCIRS can review decisions made on or after 3 December 2019. This requires that:

- a conciliation officer issues a 'genuine dispute' certificate; or
- a Court revokes a direction issued by a conciliation officer to an agent and finds there is a genuine dispute in relation to the decision.¹²¹

3.100. Between the commencement of the WCIRS on 30 April 2020 and 29 January 2021 (the most recent data available), 261 requests for review were received by the WCIRS.¹²² The majority of the requests related to eligibility decisions. Following review:

- approximately 32% of agent decisions were overturned;
- approximately 10% were withdrawn by the agent. Agents may withdraw the claim from the review process if they decide to vary their decision;¹²³
- approximately 28% affirmed the agent decision;
- approximately 16% were deemed invalid, which means that WCIRS determined the matter referred to it doesn't fall within a 'reviewable decision';
- approximately 11% were still pending; and
- approximately 3% were withdrawn by workers.¹²⁴

3.101. If WorkSafe determines that a decision is not 'sustainable', WorkSafe will direct the agent to overturn the decision using its powers under the WIRC Act and in line with the agent agreement. A sustainable decision is one that is fairly and reasonably made, with a reasonable prospect of being maintained by a court.¹²⁵

120 WCIRS Web Page (n 118).

121 WCIRS Web Page (n 118).

122 WorkSafe Victoria, *Workers Compensation Independent Review Service Stakeholder Monthly Report* (29 January 2021), 3 (WCIRS Monthly Report January 2021').

123 WCIRS Monthly Report January 2021 (n 122) 3.

124 WCIRS Monthly Report January 2021 (n 122) 3.

125 WorkSafe Victoria, 'How the Workers Compensation Independent Review Service Assesses and Reviews the Agent's Decision' (Web Page, 2020).

Legal proceedings in the Magistrates' Court and County Court

- 3.102. If a party to a dispute is not satisfied with the outcome of conciliation, they may take the dispute to the Magistrates' Court.¹²⁶ This requires an ACCS conciliation officer to have issued a 'genuine dispute' certificate confirming the worker has taken all reasonable steps to settle the dispute.¹²⁷ Unlike the ACCS dispute process, issuing legal proceedings generally involves legal professionals and monetary costs for the worker.
- 3.103. The WorkCover Division of the Magistrates' Court is responsible for hearing disputes that relate to the matters that the ACCS considers.¹²⁸
- 3.104. The County Court considers workers' compensation matters relating to serious injury certificates and common law damages for negligence by employers.¹²⁹
- 3.105. The courts may refer a medical question to a Medical Panel for a determination on that element of the dispute.
- 3.106. In 2017-18, 70% of decisions that proceeded to court (and were resolved by 31 August 2019) were varied or overturned.¹³⁰ Between 1 July 2020 and 28 February 2021:
- 58% of initial liability decisions that proceeded to court were varied by agreement or overturned;
 - 72.5% of decisions relating to termination of claims were varied by agreement or overturned; and
 - approximately 68% of overall decisions that proceeded to court were varied or overturned).¹³¹
- 3.107. I note the effects of the COVID-19 pandemic, particularly the associated restrictions and extensions of compensation may have impacted these recent statistics.

126 WIRC Act s 266.

127 Note that proceedings other than those relating to death claims and common law claims must not be commenced in either the Magistrates' Court or the County Court before the dispute has been referred to conciliation.

128 See Magistrate's Court of Victoria, 'WorkCover Division' (Web Page, 30 October 2020) <<https://www.mcv.vic.gov.au/civil-matters/workcover-division>>.

129 WIRC Act s 335. The Serious Injury List is established under the *County Court Civil Procedure Rules 2018* Order 34A.04(1)(f).

130 Victorian Ombudsman 2019 (n 109) 124.

131 Email from [REDACTED] (WorkSafe) to Kirsten McKillop, Director - Independent Agent Review, 22 March 2021.

- 3.108. Pursuing a matter to court is costly, stressful and time consuming. The 2019 Ombudsman report found that most workers ‘simply give up’.¹³²

‘It took us too long to work out how the whole system works [but we were able to]. [Agents] are not there to help. We met a guy who was homeless. He was living in his car because he had this injury but WorkCover pushed him aside, and he didn't dispute the decision because it was too emotionally hard and as a result he has been living in his car, he's given up...it's sad it's come to this. I don't think there are reports on suicide rates, family breakups, because they couldn't handle the system and financial support is cut off. It's bad for the whole community’

Sonya, injured worker

Medical Panels

- 3.109. Medical Panels are expert panels of specialist doctors. They jointly consider and provide opinions on ‘medical questions’ that arise from a dispute under workers' compensation legislation.¹³³ Medical Panels were first established in Victoria in the early 1990s.¹³⁴
- 3.110. A conciliation officer, a Court, an agent or a self-insurer may refer disputed issues relating to medical questions to a Medical Panel.¹³⁵ Opinions provided by Medical Panels are final and legally binding. Appeals from Medical Panel opinions are rare and are generally confined to questions of process such as the duty to provide reasons.¹³⁶
- 3.111. A Medical Panel may ask a worker to meet with it and answer questions, or to submit to a medical examination by the Medical Panel or by a member of the Medical Panel.¹³⁷ If a worker unreasonably refuses to comply with a request, or

¹³² Victorian Ombudsman 2019 (n 109) 9.

¹³³ Medical Panels, ‘About Us’ (Web Page, 19 February 2021) <<https://www.medicalpanels.vic.gov.au/about-us#what-we-do->>. ‘Medical question’ is defined in the WIRC Act s 3.

¹³⁴ Medical Panels (n 133).

¹³⁵ WIRC Act s 302.

¹³⁶ See, eg, *Wingfoot Australia Partners Pty Ltd v Kocak* [2013] HCA 43.

¹³⁷ WIRC Act s 307.

hinders an examination, the worker's right to compensation (including weekly payments) is suspended until the examination has taken place.¹³⁸

3.112. Medical Panels must follow guidelines issued by the Minister for Workplace Safety (following consultation with the Attorney-General) relating to procedural fairness and proper administration.¹³⁹ Medical Panels are otherwise required to act 'informally' and are not bound by rules or practices of evidence.¹⁴⁰

3.113. In 2019-20, Medical Panels received 4,072 referrals and finalised 3,518 opinions and reasons documents relating to workers' compensation claims.¹⁴¹

138 WIRC Act s 309.

139 WIRC Act s 303.

140 WIRC Act ss 303(2) and 303(3).

141 Medical Panels (n 133).

4. Administration of the workers' compensation scheme

'very cruel horrific system, worst experience of my life'

'Jessica', injured worker

Key points

- The Victorian workers' compensation system is managed by WorkSafe Victoria.
- WorkSafe chooses to outsource its management of workers' compensation claims to agents. It is not required to do so.
- Agents 'stand in the shoes' of WorkSafe. Any function or power performed or exercised by a WorkSafe agent is taken to have been performed by WorkSafe.
- WorkSafe has a range of oversight and governance structures to guide the work of agents including an 'agency agreement' which sets out the terms and conditions for WorkSafe agents.
- Agents receive financial incentives and penalties. Performance above a specified measure results in a reward payment, and below that level results in a financial penalty. These financial incentives are reviewed and adjusted annually based on WorkSafe priorities.

Purpose of the chapter

- 4.1. The purpose of this chapter is to describe how the Victorian workers' compensation scheme is administered including:
- the outsourced 'agent model' currently used in Victoria to manage workers' compensation claims;
 - agent contracts and financial incentives; and
 - WorkSafe oversight of agents.

Models for managing compensation schemes

- 4.2. WorkSafe outsources its management of workers' compensation claims to agents. The outsourcing of claims management to agents is known as 'the agent model'.
- 4.3. The WIRC Act *permits* WorkSafe to outsource the management of claims. It is important to note that the WIRC Act does not require WorkSafe to use the agent model to meet its statutory objective of ensuring 'that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as expeditiously as possible'.¹ WorkSafe's use of the agent model is a matter of choice by WorkSafe.
- 4.4. Across Australian and New Zealand compensation jurisdictions, there are three main models for managing compensation schemes:
- **Agency models**, such as the Victorian, New South Wales and South Australia workers' compensation schemes.
 - **Management by a statutory insurer**, such as the Transport Accident Commission scheme in Victoria, Queensland's workers' compensation scheme and New Zealand's accident compensation scheme. In these schemes the statutory insurer manages claims 'in house'.
 - **Privately underwritten schemes** managed by private insurers, such as the workers' compensation schemes of Tasmania and Western Australia.
- 4.5. The key features and differences between Australian schemes, as well as the New Zealand accident compensation scheme are described in Appendix E.

Administration of the agent model

- 4.6. The below sections describe how the scheme is administered in practice and the division of responsibility between WorkSafe and agents including:
- the objectives and functions of WorkSafe, as described in the WIRC Act;
 - WorkSafe governance and oversight of agents;
 - the contracts between WorkSafe and its agents—the 'agency agreement';
 - the role of the claims manual;
 - functions, duties and responsibilities of agents;
 - capability and training requirements for agents;
 - financial incentives for agents; and

¹ *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 492(c) ('WIRC Act').

- required succession arrangements if an agent exits the scheme.

Role of WorkSafe

- 4.7. As noted in Chapter 2, when it was established in 1985, the original administrator and manager of the WorkCare scheme was the Accident Compensation Commission. The Commission's Board of Management was a representative body. It included representatives of unions, employers and 'the community'. It also included two Ministerial appointments of people with 'special expertise' the Minister considered 'necessary to enable the Commission to perform its functions and exercise its powers'.²
- 4.8. In 1992, the Accident Compensation Commission was abolished and replaced by the Victorian WorkCover Authority.³ The Authority's Board of Management consisted of persons appointed by the Governor in Council. The Act provided no guidance about whether such people were to be representative. In practice, the Authority's Board members have tended to be people with actuarial, accounting, funds management, business administration and risk management backgrounds.
- 4.9. 'WorkSafe', as the Victorian WorkCover Authority is commonly described, is continued in existence by the WIRC Act.⁴ It remains the manager of the Victorian workers' compensation scheme. WorkSafe's objectives are to:
- a) manage the accident compensation scheme as effectively, efficiently and economically as is possible; and
 - b) manage the accident compensation scheme in a financially viable manner; and
 - c) ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as expeditiously as possible; and
 - d) develop such internal management structures and procedures as will enable the Authority to perform its functions and exercise its powers effectively, efficiently and economically; and
 - e) administer the WIRC Act, along with the *Accident Compensation Act 1985*, the *Workers Compensation Act 1958*, the *Occupational Health and*

² *Accident Compensation Act 1985* (Vic) s 23(4)(g) as at 30 July 1985.

³ *Accident Compensation (WorkCover) Act 1992* (Vic) s 9.

⁴ WIRC Act s 491(1).

*Safety Act 2004, the Equipment (Public Safety) Act 1994 and the Dangerous Goods Act 1985.*⁵

- 4.10. WorkSafe's functions under the WIRC Act relevant to the Review, include:
- providing insurance, determining and collecting premiums in accordance with the WIRC Act;
 - ensuring that the scheme is competitive and fully-funded;
 - receiving, assessing and accepting or rejecting claims for compensation;
 - paying compensation to those entitled under the relevant legislation;
 - assisting employers and workers in achieving healthy and safe working environments;
 - promoting the effective rehabilitation of injured workers and their early return to work;
 - monitoring the operation of occupational health and safety, rehabilitation and accident compensation arrangements; and
 - developing programs to meet the special needs of target groups.⁶
- 4.11. Since 1996, WorkSafe has also been responsible for monitoring and enforcing compliance with the *Occupational Health and Safety Act 2004* (Vic) as well as other functions under that Act.⁷

WorkSafe governance and oversight of agents

- 4.12. WorkSafe has a general power of delegation. Any function or power performed or exercised by a delegate of WorkSafe 'is taken to have been performed by the Authority'.⁸
- 4.13. In addition to this general power of delegation, WorkSafe is empowered, but not required, to 'appoint by an instrument any person to be an authorised agent of the Authority'.⁹
- 4.14. In 2016, WorkSafe appointed five agents on five year agreements to 'act on behalf of the VWA in relation to the administration of WorkCover Insurance for

⁵ WIRC Act s 492.

⁶ WIRC Act s 493.

⁷ *Occupational Health and Safety Act 2004* (Vic) s 7.

⁸ WIRC Act s 500(1).

⁹ WIRC Act s 501(1).

registered employers and the management of claims for compensation...'.¹⁰ The five agents for the period 2016–2021 are:

- Allianz Australia Workers' Compensation (Victoria) Ltd;
- CGU Workers Compensation (Vic) Ltd;
- EML Vic Pty Ltd;
- Gallagher Bassett Services Workers Compensation Vic Pty Ltd; and
- Xchanging Integrated Services Victoria Pty Ltd trading as Xchanging.

4.15. Agents appointed by WorkSafe must comply with the terms and conditions of appointment and 'such directions as are given in writing' to them by WorkSafe.¹¹ A failure to do so enables WorkSafe to terminate the appointment of an agent.¹² WorkSafe may also take 'any other action' it considers appropriate short of termination of the authorisation.¹³

4.16. By an instrument dated 20 May 2016 issued pursuant to section 501(1) of the WIRC Act, WorkSafe delegated its powers and functions associated with receiving and managing claims under the WIRC Act to each of the agents.¹⁴

4.17. One of these agents, CGU, will cease its involvement in the WorkCover scheme at the end of June 2021.¹⁵ WorkSafe plans to start managing approximately 500 of the claims currently managed by CGU directly or 'in-house', rather than using an alternative agent. WorkSafe will take over the management of current CGU claims for workers who have received 130 weeks or more of weekly payments and who are unlikely to return to their pre-injury employer.

4.18. The remaining CGU claims will be managed by the four continuing agents. WorkSafe has extended the other four existing agent agreements until 30 June 2023 by rolling over the existing agency agreement.

10 WorkSafe Victoria, *Agency Agreement between Victorian WorkCover Authority and Agent 2016–21*, sch A ('Agency Agreement 2016–21').

11 WIRC Act s 501(2). The agreements expressly preserve this statutory power—see Agency Agreement 2016–21 (n 10) cl 2.4(a).

12 WIRC Act s 501(4).

13 WIRC Act s 501(5).

14 Victorian WorkCover Authority, *Instruments of Appointment of Authorised Agents* (20 May 2016).

15 Noel Towell, 'Another blow to WorkSafe as key private partner walks away', *The Age* (online), 15 December 2020

<<https://www.theage.com.au/national/victoria/another-blow-to-WorkSafe-as-key-private-partner-walks-away>>.

Agency 'agreements'

- 4.19. Each of the five current agents was appointed with effect from 30 June 2016 under an instrument of appointment dated 20 May 2016.¹⁶
- 4.20. The 'terms and conditions' of appointment of WorkSafe's five agents are in the 'agency agreements' 2016-2021. The Review was provided with a 'template agreement' dated 12 September 2018. I understand that each of the five agents entered into an agreement with WorkSafe in the terms of the template.
- 4.21. The only reference in the delegation section of the WIRC Act (section 501) to the need for an agreement between WorkSafe and agents relates to remuneration. Under section 501(3), an agent is entitled to be paid 'such remuneration as is agreed...for acting as an agent'.
- 4.22. Section 501(1) of the WIRC Act provides that the legal foundation for the creation of an agency relationship is an 'authorisation'—a unilateral act by WorkSafe. Section 501(2) provides that an authorised agent 'must act as agent subject to—
- a) such terms and conditions as are specified in the instrument of appointment; and
 - b) such directions as are given in writing to the authorised agent by the Authority'.
- 4.23. The agency agreement states that the legal relationship created by it 'is that of principal and agent' and that the relationship 'is fiduciary and imposes fiduciary duties upon the agent'.¹⁷ This means that the agent agrees to act in the interests of WorkSafe in the exercise of its powers and recognises WorkSafe's vulnerability to any abuse of the agents' fiduciary position.¹⁸
- 4.24. Agents are required to comply with:¹⁹
- a claims manual published by WorkSafe and updated regularly to assist agents to make decisions in accordance with the legislation;
 - Ministerial guidelines regarding conduct at conciliation conferences;²⁰

16 Victorian WorkCover Authority (n 14).

17 Agency Agreement 2016–21 (n 10) 9, cl 2.6. The legal conception of agency is expressed in the Latin maxim '*Qui facit per alium facit per se*' - one who acts through another is deemed to act through himself or herself: *Peterson v Moloney* (1951) 84 CLR 91, 94.

18 See generally *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

19 Agency Agreement 2016–21 (n 10) sch A, A1.

20 Assistant Treasurer, *Ministerial Guidelines as to Authorised Agent, Self-Insurer, Employer and Workers' Assistant Conduct at Conciliation Conference 2011 in Victoria*, 13 April 2011.

Improving the experience of injured workers

- a Code of Conduct;²¹
 - any direction given in writing by WorkSafe;
 - certain guidelines and advisory practice notes provided by WorkSafe;²² and
 - any other written instructions, policies, procedures or guidelines given by WorkSafe to agents from time to time.
- 4.25. WorkSafe also engages agents to manage ongoing liabilities under the superseded *Workers Compensation Act 1958* (Vic) (the 1958 Act) and the Transport Accident Commission (TAC) to manage catastrophic injury claims.²³ I describe the TAC function at 4.29.
- 4.26. The claims management functions of agents include:
- receiving claims;
 - assessing claims and determining entitlements;
 - managing claims that are accepted;
 - participating in conciliation for disputed claim decisions; and
 - defending disputed claim decisions in court.
- 4.27. The agency agreement commences with a series of Recitals. Recital B is in the following terms.
- The objectives of WorkSafe under section 492 of the WIRC Act are, among other things, to:
- manage the accident compensation scheme as effectively, efficiently and economically as is possible; and
 - administer the Acts.²⁴
- 4.28. No mention is made in the agency agreement of WorkSafe’s important objective to: ‘ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as expeditiously as possible’.²⁵

21 Agency Agreement 2016–21 (n 10) Sch I.

22 WIRC Act s 496.

23 WIRC Act ss 500 and 501.

24 Agency Agreement 2016–21 (n 10) 1.

25 WIRC Act s 492(c). It was this objective that the Victorian Ombudsman referred to in her 2019 report as not being achieved by the system as a result of the ‘systemic problem’ established by the evidence she had examined. See Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers’ compensation claims* (Report, December 2019) 219 (‘Victorian Ombudsman 2019’).

Transport Accident Commission (specialised agent)

- 4.29. As noted, WorkSafe also has a specialised agreement with the Transport Accident Commission (TAC) to manage 'catastrophically' injured workers who require specialist ongoing care and supports. The TAC's involvement with these workers is known as the Community Integration Program.
- 4.30. Catastrophic injuries include paraplegia, quadriplegia, or a severe or moderately severe acquired brain injury.²⁶
- 4.31. WorkSafe commenced its specialised agreement with TAC in 2006.²⁷ WorkSafe entered this arrangement because it considered TAC to have a 'progressive and effective' approach to managing catastrophic claims, through its lifetime support model.²⁸
- 4.32. Workers with injuries managed under the community integration program have their claims managed jointly by the TAC and an agent.²⁹
- 4.33. Agents are responsible for identifying eligible workers and providing a recommendation to WorkSafe. The agent continues to manage the payment of weekly compensation, common law and lump sum entitlements for these workers.
- 4.34. WorkSafe confirms the injured worker's eligibility for the program and authorises the involvement of the TAC.
- 4.35. The TAC manages the medical and rehabilitation needs of the worker.³⁰ A TAC Support Coordinator works with the injured worker and others involved in their rehabilitation to develop an 'independence plan'. The independence plan outlines services and supports to facilitate the injured worker's living, work and leisure goals.³¹
- 4.36. The community integration program is currently provided to 257 individuals.

26 WorkSafe Victoria, 'Claims Manual' (Web Page, 2020) pt 2.6.4 <www1.worksafe.vic.gov.au/vwa/claimsmanual/Home.htm> ('WorkSafe Claims Manual').

27 WorkSafe Victoria, *Annual Report 2007* (Report, October 2007) 30 ('WorkSafe Annual Report 2007').

28 WorkSafe Annual Report 2007 (n 27) 30.

29 WorkSafe Claims Manual (n 26) pt 2.6.4.

30 WorkSafe Claims Manual (n 26) pt 2.6.4.

31 WorkSafe Victoria, *More Information About: Community Integration Program* (Information Booklet, 2013).

A changing claims management model

4.37. In 2002, WorkSafe changed its claims management model significantly in response to the recommendations of a 2001 McKinsey & Company report.³² I describe the recommendations of the McKinsey & Company report in more detail in Chapter 5. The new claims management model it introduced included:

- Risk assessment and segmentation for risk-based claims management;
- The use of multi-disciplinary teams; and
- Role specialisation to deliver required levels of capability for various claim 'segments'..³³

4.38. These changes were assessed by the Auditor-General as part of a 2001 investigation of WorkSafe's claims management..³⁴ The report concluded that the changes, which were then in their infancy, were 'consistent with best practice design principles'..³⁵

4.39. However, this approach was changed significantly in 2015. A WorkSafe Contract Management Framework to provide prospective agents with information about the 2016–2021 agency agreements describes the changed approach:

In 2015, WorkSafe changed its requirements to provide Agents greater scope and flexibility to deliver core claims and premium management services. It was WorkSafe's intent to encourage and facilitate innovation, including for structural efficiency. This requirement has been incorporated into the Request for Tender (RFT) for the 2016 Agent Panel..³⁶

Functions, duties and responsibilities

4.40. Under the agency agreement, each agent must:

- carry out on behalf of the VWA the functions, duties and responsibilities set out in Schedule A;
- comply with client service requirements detailed in Schedule H;
- comply with the code of conduct as set out in Schedule I;

32 Victorian Auditor-General's Office, *Management of claims by the Victorian WorkCover Authority* (Audit report, November 2001) 5 ('VAGO 2001').

33 WorkSafe Victoria, *Agency Agreement Contract Management Framework 2016-2021*, 8 ('Contract Management Framework 2016–21').

34 VAGO 2001 (n 32).

35 VAGO 2001 (n 32) 45.

36 Contract Management Framework 2016–21 (n 33) 8-9.

Improving the experience of injured workers

- comply with the capability and training requirements outlined in Schedule L;³⁷ and
- provide 'a Transition Plan and Change Management Framework' to provide for transfer of claims management to another agent if the agent stops being a WorkSafe agent.³⁸

4.41. It is necessary to briefly examine each of these in turn.

4.42. Each agent is required to 'carry out on behalf of the VWA the functions, duties and responsibilities set out in Schedule A in accordance with this Agreement, the Acts, and applicable regulations, the Premiums Order, any Ministerial Directions and any Written Directions'.³⁹

4.43. Schedule A identifies the following responsibilities of each agent in relation to WorkCover claims management:⁴⁰

- Claims receipt, recording and allocation;⁴¹
- Claims investigation and determination;⁴²
- Claims administration;⁴³
- Case management;⁴⁴
- Treatment management;⁴⁵
- Assisting employers and workers to meet return to work obligations;⁴⁶
- Dispute resolution and legal administration;⁴⁷
- Recoveries;⁴⁸
- Management of uninsured employers and recoupable claims;⁴⁹ and
- Management of tail claims.⁵⁰

37 Agency Agreement 2016-21 (n 10) cl 5.2.

38 Agency Agreement 2016-21 (n 10) cl 3.6, sch E.

39 Agency Agreement 2016-21 (n 10) cl 5.2(a).

40 Agency Agreement 2016-21 (n 10) sch A, cl 2.

41 Agency Agreement 2016-21 (n 10) sch A, cl 2.1.

42 Agency Agreement 2016-21 (n 10) sch A, cl 2.2.

43 Agency Agreement 2016-21 (n 10) sch A, cl 2.3.

44 Agency Agreement 2016-21 (n 10) sch A, cls 2.4, 2.5.

45 Agency Agreement 2016-21 (n 10) sch A, cl 2.6

46 Agency Agreement 2016-21 (n 10) sch A, cl 2.7.

47 Agency Agreement 2016-21 (n 10) sch A, cl 2.8.

48 Agency Agreement 2016-21 (n 10) sch A, cl 2.9.

49 Agency Agreement 2016-21 (n 10) sch A, cl 2.10.

50 Agency Agreement 2016-21 (n 10) sch A, cl 2.11.

Improving the experience of injured workers

- 4.44. Schedule A also requires each agent, in performing its claims management functions, to 'assign claims to separate risk segments as specified in Written Directions issued by the VWA from time to time'.⁵¹
- 4.45. WorkSafe did not provide me with any Written Directions under this clause in relation to these matters during the life of the current agency agreement in response to my request for the same.
- 4.46. An agent is required to 'initially assess the risk profiles of new claims, then periodically review files to reassess existing risk and appropriateness of the assigned risk stream in which cases are currently being managed'.⁵²
- 4.47. The following case study outlines one worker's experience of case management in the WorkCover system.

A worker's experience with case management⁵³

'Terry' has been on workers' compensation since he was injured at work more than eight years ago. He has dealt with three different agents during this time.

In responding to the Review's survey, Terry said:

My journey has been one of stumbling in the dark only becoming aware, having my eyes open after realising I had been hoodwinked, then having to fight what is necessary for my physical and mental health which both are still an issue 8.5 years on.'

At the time of contacting the Review, Terry had recently put in a request for a minor procedure after a major surgery. The request was denied. Terry said that the result of the agent's denial was that he suffered from chronic pain that he need not have if the procedure had been approved when the request was first made. Terry described that by the time the procedure was finally approved '*[it] has taken so long that my injury has become worse and caused secondary injuries[,] a hopelessness for any type of future and depression.*'

Terry told the Review that he had one case manager who was 'empathetic, helpful and listened' but this was not his current case manager.

WorkSafe's claims manual

- 4.48. WorkSafe has developed a claims manual, which is publicly available on the WorkSafe website. The website describes the purpose of the claims manual as follows:

⁵¹ Agency Agreement 2016–21 (n 10) sch A cl 2.1(c).

⁵² Agency Agreement 2016–21 (n 10) sch A cl 2.3(c).

⁵³ Survey response (worker) 261550.

Improving the experience of injured workers

This Manual has been developed by WorkSafe Victoria for use by its staff and authorised Agents who manage WorkCover claims to assist with decision making in line with the legislation.⁵⁴

- 4.49. The WorkSafe website clarifies that the claims manual 'contains matters of interpretation and policy, however it is not exhaustive'.⁵⁵
- 4.50. The claims manual covers seven major areas:
- **WorkCover scheme**—an overview of key aspects of the scheme;
 - **Claims management**—includes definitions of workers and injuries, how a claim is received and registered, how initial liability is determined, how claims are managed during different phases, and the use of a multidisciplinary approach;
 - **Weekly payments**—includes the process for calculating weekly payments, eligibility requirements for weekly payments relating to a certificate of capacity, and termination or alteration of weekly payments;
 - **Medical and like services**—includes information on reasonable costs for medical and like services and the termination of medical and like services;
 - **Return to work and recovery**—includes information on worker and employer return to work obligations and return to work processes;
 - **Specialised payments**—includes information on specialised payments that a worker may be entitled to, specifically, death claims, impairment benefits, common law rights and settlements; and
 - **Dispute resolution**—includes information on types of disputes, the dispute resolution process and costs.⁵⁶
- 4.51. The WorkSafe website states that the manual 'is subject to continuous review and subsequent updates will be published on the WorkSafe website as required'.⁵⁷ There is a clearly labelled section on the claims manual homepage entitled 'recent updates' which describes recent updates to the manual.
- 4.52. The claims manual provides some further detail about claims segmentation:
- Accepted claims for weekly payments are managed in either the 0-78 weeks, 78-130 weeks or the 130+ weeks segment.⁵⁸

54 WorkSafe Claims Manual (n 26).

55 WorkSafe Claims Manual (n 26).

56 WorkSafe Claims Manual (n 26).

57 WorkSafe Claims Manual (n 26).

58 WorkSafe Claims Manual (n 26) pt 2.6.3.

Improving the experience of injured workers

4.53. The current claims segmentation approach is discussed in more detail in Chapter 6.

4.54. The claims manual states that:

When managing claims in any of these segments, Agents are required to:

- develop a claim summary with a case management strategy; and
- manage claim using a multidisciplinary approach.⁵⁹

4.55. The objectives of the multidisciplinary approach are to:

- evaluate the worker's capacity to return to work based on information obtained:
- no current work capacity (including catastrophic claims)
- a significantly reduced work capacity
- a current work capacity but with no suitable employment identified or
- a current work capacity with suitable employment identified;
- identify [return to work] barriers and goals;
- assess the appropriateness of current entitlements, treatment and services;
- identify potential entitlements such as impairment benefit; and
- develop strategies to manage the claim.⁶⁰

4.56. I note that there is no detail in the agency agreement and very limited detail in the claims manual about this 'multidisciplinary approach' to be used in managing claims. It appears that the lack of guidance for agents from WorkSafe about the multidisciplinary approach is part of the 'greater scope and flexibility' that the agents were given for the 2016-2021 agency agreement. This flexibility is described in the 'Contract Management Framework', discussed at 4.39.⁶¹

4.57. The Contract Management Framework states that:

WorkSafe does however retain the discretion to implement nominated roles should this be required to achieve scheme outcomes during the term of appointment.⁶²

Client service requirements

4.58. An agent must comply with the 'client service requirements' specified in Schedule H of the agency agreement. The Schedule states that the VWA is 'progressively

⁵⁹ WorkSafe Claims Manual (n 26) pt 2.6.3.

⁶⁰ WorkSafe Claims Manual (n 26) pt 2.6.3.

⁶¹ Contract Management Framework 2016–21 (n 33) 8-9.

⁶² Contract Management Framework 2016-21 (n 33) 9.

developing a client service charter' as part of its commitment to 'increasing support from stakeholders'.⁶³ Despite this laudable commitment being made in 2016, I have been unable to locate a 'client service charter' as at the date of my Review. A search of the WorkSafe website reveals no entries under 'client service charter'.

4.59. Schedule H describes the VWA's clients as 'employers and employees (workers) and those who assist or represent them'.⁶⁴

4.60. In dealing with the VWA's clients, agent staff are required, among other things, to:

- 'treat clients with dignity and respect';
- 'listen to the client's point of view'; and
- 'be courteous, polite and considerate'.⁶⁵

4.61. An agent is required to have a 'client service plan in place which meets the requirements as specified by the VWA'.⁶⁶ I was informed by WorkSafe that agents develop annual service plans and are required to report against them quarterly. WorkSafe provided the template it gives to agents which outlines reporting requirements. The template states:

Service Plans should include ongoing and targeted initiatives planned over the year designed to maintain and improve customer experience and service performance (e.g. people capability; service recovery; initiatives supporting APA Service Measures etc.) As part of the plans, include outcome targets (e.g. timeliness of Medical and Like decisions); relevant lead & lag indicators, process targets (e.g. number of calls evaluated; contacts established) as relevant.

4.62. WorkSafe did not advise me of any specific, universal requirements for agent client service plans when I asked for the same.

Code of conduct

4.63. Schedule I specifies a 'code of conduct' with which agents must comply. The code of conduct is four pages long but has no focus on the way agents should treat claimants. Instead, there is a strong financial focus and emphasis on reputational risk that agents may pose to WorkSafe. For example, the code of conduct covers

63 Agency Agreement 2016–21 (n 10) sch H cl 1.

64 Agency Agreement 2016–21 (n 10) sch H cl 2.

65 Agency Agreement 2016–21 (n 10) sch H cl 2.

66 Agency Agreement 2016–21 (n 10) sch H cl 5.

agent conduct while marketing and promoting, and protocols for public statements.

- 4.64. The first clause of the code of conduct highlights financial concerns, stating that an agent:

...must work co-operatively with the VWA in the conduct of its obligations under the Agreement so as to protect the financial integrity of the WorkCover scheme in accordance with the Acts.⁶⁷

Capability and training requirements

- 4.65. Agents must comply with the requirements imposed in Schedule L of the agency agreement, which sets out some fairly high-level, non-prescriptive requirements for agent capability and training.⁶⁸ Agents must also comply with 'any Written Directions issued by the VWA in relation to staff training and competency from time to time'.⁶⁹
- 4.66. WorkSafe has the power to issue such directions in relation to key matters such as:
- staff ratios;⁷⁰
 - defining requirements for suitably qualified staff performing specific roles;⁷¹ and
 - training and qualification requirements for specified roles.⁷²
- 4.67. WorkSafe did not provide me with any Written Directions given to its agents in relation to these matters during the life of the current agency agreement in response to my request for the same.
- 4.68. WorkSafe advised that in 2015 it removed the mandated and nominated roles established in 2002 and 2011 in line with the greater flexibility that it gave its agents at that time.⁷³ It replaced them with requirements that agents have suitably qualified and capable people to undertake specific functions. There are three remaining roles that are mandatory for each agent; these are the State Manager, Claims Operations Manager, and Premium Manager. WorkSafe advised

67 Agency Agreement 2016-21 (n 10) sch I cl 1.1.

68 Agency Agreement 2016-21 (n 10) cl 6.3(b).

69 Agency Agreement 2016-21 (n 10), cl 6.3(b).

70 Agency Agreement 2016-21 (n 10) cl 6.5.

71 Agency Agreement 2016-21 (n 10) cl 6.5.

72 Agency Agreement 2016-21 (n 10) cl 6.6, sch L cls 1.2(a), 1.3(a), 1.4(b).

73 See Chapter 4 at 4.39.

that staff ratio requirements were removed as part of a move towards a 'capability-based framework'.⁷⁴

- 4.69. WorkSafe informed me that the claims model adopted by agents is 'a functional model and subject to approval by WorkSafe' and that agents 'are required to assign functions to specific roles based on experience and technical expertise'. WorkSafe said that '[t]he requirement to be “suitably qualified” is also oversighted through both the capability and training programs ... and the system of authorisations and delegations'.⁷⁵
- 4.70. Once again, this appears to be part of WorkSafe’s ‘light touch’ approach to oversight.

Succession arrangements

- 4.71. Clause 3.6 of the agency agreement obliges each agent to prepare and deliver to WorkSafe a ‘Transition Plan and a Change Management Framework’ by 30 June 2017. The Plan must comply with Schedule E.
- 4.72. Schedule E provides that such a plan must, among other things, deal with how the agent will manage the transition of its employers to another agent on the expiry of the term of appointment.⁷⁶ Where appropriate, it must include, among other things:
- a) A project plan setting out certain matters including governance arrangements to provide oversight of the transition plan;⁷⁷
 - b) A statement about the delivery of files and records;⁷⁸ and
 - c) A statement that the agent will be available to respond to queries for not less than 21 days after the end of the Transition Plan.⁷⁹
- 4.73. The recently announced departure of CGU from the scheme is a reminder of the importance of orderly transitions for injured workers, employers and WorkSafe.
- 4.74. I note that these obligations are limited to a situation where one or more employers are transferred *from one agent to another agent*. The current

74 Email from [REDACTED] (WorkSafe) to Kirsten McKillop, Director – Independent Agent Review, 30 March 2021.

75 Email from [REDACTED] (WorkSafe) to Kirsten McKillop, Director – Independent Agent Review, 30 March 2021.

76 Agency Agreement 2016-21 (n 10) sch E cl 1.2.

77 Agency Agreement 2016-21 (n 10) sch E cl 1.3(d).

78 Agency Agreement 2016-21 (n 10) sch E cls 1.3(e)–(f).

79 Agency Agreement 2016-21 (n 10) sch E cl 1.3(h).

agreement does not make provision for transition and change management arrangements in a situation where employers are transferred *from an agent to WorkSafe*.

Agent financial incentives

- 4.75. WorkSafe pays its agents a fee and other financial rewards and penalties which are linked to performance measures set in the contracts.⁸⁰
- 4.76. There are two components to the current agent remuneration model:
- a service fee (around 85 per cent of total fees); and
 - financial incentives and penalties called annual performance adjustments.⁸¹
- 4.77. In 2019-20, agents were paid approximately \$263 million by WorkSafe.⁸² A further \$2.5 million (combined) was paid to the TAC for managing claims from injured workers with catastrophic injuries and to agents for managing liabilities under the *Workers' Compensation Act 1958 (Vic)*.⁸³
- 4.78. WorkSafe reviews and adjusts these financial incentives annually in response to changing risks and scheme priorities. An example is changing claim profiles such as the increase in recent years of the proportion of claims that are mental injury claims.⁸⁴
- 4.79. Agent performance above a specified base level on a particular measure results in a reward payment, and below that level results in a financial penalty. Agents must exceed the service fee minimum standards before they can participate in financial incentives for specified measures.
- 4.80. Each incentive is allocated a percentage 'weighting'. Weightings are the proportion of annual premium-based fees payable to an agent, allocated against each measure. For example, where an incentive is assigned a 12% financial reward value, this will be calculated as 12% of the agent service fee (premiums paid by employers to that agent) for the relevant year. A financial incentive is paid in addition to the fixed payments.

80 WorkSafe Victoria, *Annual Report 2020* (Report, 2020) 80 ('WorkSafe Annual Report 2020').

81 Submission DP57 (WorkSafe).

82 WorkSafe Annual Report 2020 (n 80) 80.

83 WorkSafe Annual Report 2020 (n 80) 80.

84 Submission DP57 (WorkSafe).

Financial incentives examined in Ombudsman's 2016 report

- 4.81. The framework for the financial incentives and penalties came from the recommendations of a 2001 WorkSafe commissioned report by McKinsey & Company in 2001.⁸⁵ This report is described in more detail in Chapter 5.
- 4.82. This 'new' claims management model was endorsed by WorkSafe in July 2001 and introduced in stages in 2002. Financial incentives for agent performance formed part of the new model, including 'continuance rates', which measured how many injured workers were still receiving compensation at various, specified intervals. These intervals varied over time, but were generally 13 weeks, 26 weeks, 52 weeks and 130 weeks.
- 4.83. In her 2016 report, the Victorian Ombudsman criticised the agent financial incentives as placing too much emphasis on termination and rejection of claims, rather than on sustainable and evidence-based decisions.
- 4.84. The 2016 Ombudsman report considered the specific penalties and incentives set out in the 2014-15 annual performance adjustments.
- 4.85. The Ombudsman described them as including financial incentives for agents that explicitly focused on terminating workers' claims, such as:
- terminating claims before they reach 13, 52 and 134 weeks;
 - terminating long-term claims (this is known as an 'active claims measure');
 - terminating medical and like entitlements at 52 weeks; and
 - reducing medical expenditure.⁸⁶
- 4.86. The above measures were associated with 19% positive weighting (incentives), and -12.5% financial penalties.
- 4.87. In contrast, only 12.5% in financial reward values and -7% in financial penalties related to decision-making factors. The majority of these were tied to injured worker survey results. Only 2.5% reward and 1.5% penalty were directly tied to the quality decision-making measure.

⁸⁵ McKinsey & Company, *Improving Return to Work Outcomes Through Claims Excellence: Recommendations Victorian WorkCover Authority Phase 3 Final Progress Report—Team Leader Version* (27 July 2001).

⁸⁶ Victorian Ombudsman, *Investigation Into the Management of Complex Workers Compensation Claims and WorkSafe Oversight* (Report, September 2016) 124 ('Victorian Ombudsman 2016').

Findings on agent financial incentives in Ombudsman's 2019 report

4.88. In her 2019 report the Victorian Ombudsman acknowledged the following changes to the financial incentives that had occurred since her 2016 report was published:

- reducing the rewards and penalties for terminating claims;
- increasing the rewards and penalties for quality decisions;
- introducing a long-term return to work measure, which rewards agents for returning workers to work after being incapacitated for more than six months but less than two years; and
- changing the scope of the existing return to work measure so agents are only rewarded for claims where the worker returned to work and stayed at work for a minimum amount of time.⁸⁷

4.89. However, despite these changes, the Ombudsman concluded that:

Although the investigation identified limited documentary evidence that the financial rewards and penalties continue to influence agent decisions, compared with the 2016 investigation, it still found some evidence showing:

- agents' continued focus on terminating claims and maximising profit; and
- the influence of the rewards and penalties on agents' offers at conciliation.⁸⁸

Financial incentives in 2020-21 annual performance adjustments

4.90. WorkSafe's submission to the discussion paper stated that the 2020-21 financial incentives differ from the previous financial incentives in the following ways:

- increased weighting on mental injury performance for the 26 week 'back at work' measure;
- increased weighting on worker capacity at the 52 week and 104-week weekly payments mark ('capacity' is the ability of a worker to carry out work duties);
- introduction of 'co-funded' measures, such as mobile case management to increase workers' capacity; and
- introduction of complex care measures, including transition support and recovery assistance.⁸⁹

⁸⁷ Victorian Ombudsman 2019 (n 25) 143.

⁸⁸ Victorian Ombudsman 2019 (n 25) 146.

⁸⁹ Submission DP57 (WorkSafe) 6.

Improving the experience of injured workers

- 4.91. WorkSafe increased the weightings on the 'back at work' metrics (the proportion of workers returning to work at specified intervals after a claim is lodged). It also introduced capacity measures after the 2016 Ombudsman investigation.
- 4.92. These metrics seem to be aimed at addressing concerns that the previous financial incentives placed too much emphasis on termination and rejection of claims, rather than on sustainable and evidence-based decisions.
- 4.93. The most significant change is the removal of all 'continuance rates'. As noted, continuance rates previously rewarded agents for reducing the number of workers on weekly benefits at various intervals. The Ombudsman described these 'continuance rate' incentives as contributing to problematic agent decision making on complex claims.⁹⁰
- 4.94. Many submissions criticised WorkSafe for providing financial incentives to agents to terminate claims.⁹¹ Many people I consulted with were not aware that the financial incentives for terminating claims were removed for 2020-21.
- 4.95. The removal of the continuance rates means that for the 2020-21 financial year there are no incentives directly aligned to termination of claims. The revised incentives appear to provide agents with increased incentives to manage claims in a way that results in improvements to workers' health and return to work outcomes. WorkSafe is to be commended for making this important change.

⁹⁰ Victorian Ombudsman 2016 (n 86) 143.

⁹¹ See, eg, Submissions DP8 (ACJI Monash), DP30 (HACSU), DP39 (LIV).

5. Previous reviews of the agent model

'[We] had the 2016 Ombudsman's report, the 2019 Ombudsman's report and it goes around in circles, nothing seems to change, but no one cares because injured workers are seen as a bludger. And to be honest, before [it] happened to me, I thought the same thing and now I see...'

'Tina', injured worker

Key points

- This Review follows two Victorian Ombudsman reports into the management of complex workers' compensation claims.
- Several reviews preceded the Ombudsman's reviews, each of which has ultimately reached the same conclusion: the workers' compensation system has failed a significant proportion of injured workers.

Purpose of the chapter

- 5.1. As noted in Chapter 1, this Review is being conducted against a background of two comprehensive investigations by the Victorian Ombudsman into the management of complex workers' compensation claims. Those investigations were in turn preceded by two important investigations into the same subject matter by the Victorian Auditor-General and a further investigation by the Ombudsman.
- 5.2. During the same period, WorkSafe itself commissioned three significant reviews of its claims management practices—in 2001, 2009 and 2013. A feature of all of eight reviews is they concluded that, in one way or another, the workers' compensation system was failing a significant proportion of injured workers. This ninth review has reached the same conclusion.
- 5.3. WorkSafe's agent model has evolved in no small way in response to the findings and recommendations of these various reviews. This means that the 2021 model cannot be understood without some appreciation of those earlier reviews. That is the purpose of this chapter.

McKinsey & Company Review of 2001

- 5.4. WorkSafe engaged McKinsey & Company in 2001 to review its claims handling arrangements. I was provided with a version of the ensuing report that is headed 'draft' and is described as 'Phase 3 Final Progress Report – TEAM LEADER VERSION 27 July 2001'.¹ I requested a final version of the report from WorkSafe and received this version. Similarly, it is not entirely clear that the two other consultancy reports received from WorkSafe and discussed below are final versions. The reports provided are marked 'draft', 'deliberative' or other similar language. I have taken these reports to be final.
- 5.5. McKinsey & Company conducted a detailed review of WorkSafe's claims management model. According to the Auditor-General, the review cost WorkSafe \$2.4 million.² The review made the following high-level findings and recommendations:
- The Authority should 'continue to outsource most claims activities including recoveries and should play a significantly more active role in managing claims activities and the overall system;
 - The Authority should play a *much more* active role in specifying how claims are managed and in managing performance; ...
 - The principal/agent tension between the Authority and its agents can be mitigated through much stronger and more active management, sharper performance management and through encouraging competition amongst agents; ...
 - The transition costs of bringing activities back in-house would be very significant, and would outweigh any benefits; [and]
 - Overseas experience suggests that there is no one model of in-sourcing or outsourcing that delivers superior performance'.³
- 5.6. At the level of detail, the report recommended that WorkSafe should:
- 'Develop and implement a triage model that will generate a recommendation—but not a decision—on new claims';⁴ and

1 McKinsey & Company, 'Improving Return to Work Outcomes Through Claims Excellence: Recommendations' (Presentation to WorkSafe, 27 July 2001) ('McKinsey & Company 2001').

2 Victorian Auditor-General's Office, *Management of claims by the Victorian WorkCover Authority* (Audit report, November 2001) 5 ('VAGO 2001').

3 McKinsey & Company 2001 (n 1) 39.

4 McKinsey & Company 2001 (n 1) 10. The review concluded that the Authority is 'the natural owner of the triage model' to promote greater consistency of handling across agents.

Improving the experience of injured workers

- Require agents to set up multi-disciplinary teams comprising claims, medical and legal specialists to handle simple, complex, long-term return to work and long-term care claims differently..⁵
- 5.7. The report also recommended that employer reporting requirements should be changed:
- They should be required to report all lost time injuries within 4 days; and
 - The number of days employers have to submit claim forms should be reduced from 10 to 4..⁶
- 5.8. The McKinsey & Company report was highly influential in shaping the agent model after 2002.

The Auditor-General's reports of 2001 and 2009

- 5.9. The Victorian Auditor-General completed two audits of WorkSafe's claims management system in 2001 and 2009 respectively..⁷
- 5.10. The first audit was conducted shortly after the major review of the WorkSafe claims management model by McKinsey & Company in 2001, discussed above.
- 5.11. The Auditor-General noted that the 'proposed new claims management model retains the existing structure of outsourced claims management by private sector agents'..⁸ The report noted that this was 'despite past poor performance and the success of different approaches elsewhere'..⁹
- 5.12. The Auditor-General observed that the evidence examined by McKinsey & Company was strongly influenced by North American examples with 'limited reference to successful schemes in other countries, especially Europe'..¹⁰
- 5.13. The Auditor-General also noted that '[t]here are examples of highly efficient and effective in-sourced monopoly providers (e.g. British Columbia and Washington State), and very inefficient ones (e.g. West Virginia)'..¹¹

5 McKinsey & Company 2001 (n 1) 39.

6 McKinsey & Company 2001 (n 1) 9.

7 VAGO 2001 (n 2).

8 VAGO 2001 (n 2) 3.

9 VAGO 2001 (n 2) 38.

10 VAGO 2001 (n 2) 39.

11 VAGO 2001 (n 2) 39. Submission DP3 (Alan Clayton) drew my attention to the highly successful in-sourced schemes in Europe including in Sweden, Germany and France.

Improving the experience of injured workers

- 5.14. Ultimately, the Auditor-General was unable to express a definitive view about the appropriateness of the outsourced model and considered that the ‘cautious approach’ recommended to the Victorian WorkCover Authority by the consultant ‘may be appropriate’.¹²
- 5.15. However, one thing was clear to the Auditor-General. He considered that the success of the modified outsourced approach would depend on ‘substantially improving the performance of the agents’ through a number of initiatives including ‘more pro-active oversight’.¹³
- 5.16. One of the more important changes to the agent model effected by the Victorian WorkCover Authority in response to the McKinsey & Company report was the stipulation that each agent would be required to establish multi-disciplinary claims management teams. These teams were to manage all claims except ‘low risk claims’.¹⁴ The Auditor-General commended this as being ‘consistent with best practice design principles’ but noted that the ‘limited availability of qualified staff’ may limit the effectiveness of the multi-disciplinary claims management teams.¹⁵
- 5.17. The report recommended that the Victorian WorkCover Authority should ‘monitor the impact of the underlying structural arrangements on the achievement of the scheme’s objectives, with a view to reassessing over the next 4 years whether the improvements sought have been realised’.¹⁶
- 5.18. The report concluded that:
- The extent to which the Authority improves the overall performance of the scheme will be dependent on the performance and quality of its agents, effectiveness of the operational arrangements, improved injury management and more pro-active oversight of the system. Success cannot be assessed until the new model is fully operational, scheduled for December 2002.¹⁷
- 5.19. The Auditor-General returned to examine the claims management model in a further audit in 2009.¹⁸ That audit examined a representative sample of 150 ‘high-risk claims’ across all agents and concluded that ‘VWA’s management of

12 VAGO 2001 (n 2) 39.

13 VAGO 2001 (n 2) 39; see also 49–50.

14 VAGO 2001 (n 2) 45.

15 VAGO 2001 (n 2) 45.

16 VAGO 2001 (n 2) 42. The Victorian WorkCover Authority agreed with the recommendation, 43.

17 VAGO 2001 (n 2) 3.

18 Victorian Auditor-General's Office, *Claims Management by the Victorian WorkCover Authority* (Audit report, June 2009) (‘VAGO 2009’).

high-risk claims is *maximising the financial sustainability of the scheme*'.¹⁹

However, the report also concluded that 'there is scope...to improve agent's case management practices *in order to better maximise outcomes for injured workers*'.²⁰ In particular, the report found that '[a]gents' risk assessments are not sufficiently comprehensive to provide assurance that case management strategies address all injured workers' issues, or optimise rehabilitation and RTW'.²¹

5.20. Of particular concern were the report's findings that the multidisciplinary teams introduced by agents as a central part of the 2002 reforms were suffering from 'significant' levels of staff turnover.²² This exceeded 50% per annum in the position of 'case manager' in 2007/8.²³ The effect of this turnover was that 32 per cent of case managers did not have the required minimum two years of claims management experience.²⁴

5.21. Finally, in a prelude to later reports, the 2009 report was critical of the Victorian WorkCover Authority's monitoring of the performance of claims management by its agents.²⁵ It noted that 'agents are not remunerated on the basis of their performance against quality measures linked directly to good practice in case management'.²⁶

Boston Consulting Group review of 2009

5.22. While the Auditor-General's 2009 investigation was proceeding, Boston Consulting Group was engaged by WorkSafe to 'support the decision-making process in the upcoming 2010 agent contract renewal discussions'.²⁷

19 VAGO 2009 (n 18) 3 (emphasis added).

20 VAGO 2009 (n 18) 3 (emphasis added).

21 VAGO 2009 (n 18) 29.

22 VAGO 2009 (n 18) 34.

23 VAGO 2009 (n 18) 35.

24 VAGO 2009 (n 18) 35.

25 See generally, VAGO 2009 (n 18) pt 6.

26 VAGO 2009 (n 18) 61. The Ombudsman referred to this finding in her 2016 report: Victorian Ombudsman, *Investigation into the Management of Complex Workers Compensation Claims and WorkSafe Oversight* (Report, September 2016) 20-21, 122-123 ('Victorian Ombudsman 2016'). The Ombudsman noted that 'despite VAGO's comments that a new quality measure was needed to link outcomes in relation to termination decisions with good practice case management, WorkSafe did not introduce such a reward for five years': Victorian Ombudsman 2016 (n 26) 123.

27 Boston Consulting Group, 'Agent Model Review: Summary of Project Stage 1' (Presentation to WorkSafe Victoria, November 2008) 3 ('Boston Consulting Group 2008').

Improving the experience of injured workers

- 5.23. Boston Consulting Group reported that the top suggestions for improvement of agent performance from injured worker surveys were 'caring/ understanding/respectful/personal service' (18%), followed by 'more information/explanation' (17%) and 'good communication' (10%).²⁸
- 5.24. The report identified a number of concerns:
- 'high churn' rates in key interface roles;²⁹
 - 'employers are agents' direct clients';³⁰
 - services to workers and return to work are not priorities for many employers;³¹ and
 - 'market forces do not drive agents to focus on improving service quality to workers and [return to work] support'.³²
- 5.25. Boston Consulting Group recommended:
- increasing competition among agents to drive innovation;³³
 - increasing employer choice;³⁴ and
 - streamlining and simplifying the current incentive program.³⁵

WorkSafe agency model review of 2013

- 5.26. WorkSafe Victoria reviewed its existing agency model in 2013. The report observed that since the agency model commenced in Victoria in 1985, the scheme had tried 'at least four radically different agency models' of which the 'first three were abandoned as failures'.³⁶
- 5.27. The fourth model was the subject of the 2013 report. Its key features included:
- Strong competition between agents;
 - Advanced scheme and agent performance monitoring capability;

28 Boston Consulting Group 2008 (n 27) 16.

29 Boston Consulting Group 2008 (n 27) 20.

30 Boston Consulting Group 2008 (n 27) 22.

31 Boston Consulting Group 2008 (n 27) 22.

32 Boston Consulting Group 2008 (n 27) 22.

33 Boston Consulting Group 2008 (n 27) 78-100.

34 Boston Consulting Group 2008 (n 27) 101-114.

35 Boston Consulting Group 2008 (n 27) 115-130.

36 WorkSafe, *Agency Model Review* (Report, 2013) 8. Note: this report was initially attributed to PwC in error. Subsequent references have been revised ('WorkSafe 2013').

- Targeted KPI and incentives including the Annual Performance Adjustment (APA); and
 - Use of a common 'claims model'.³⁷
- 5.28. The review concluded that while the agent model was 'highly effective on many fronts', there was room for improvement.³⁸ The review was concerned that there was 'some stifling of Agent innovation' and recommended a substantial reduction in 'micro interventions and controls over Agents'.³⁹ It also recommended the simplification of the annual incentive system⁴⁰ and that WorkSafe minimize its intervention in 'agent roles and structures'.⁴¹
- 5.29. These recommendations were reflected in the 2016-2021 agent agreements.⁴² It is therefore perhaps not surprising that in her 2016 examination of the relationship between WorkSafe and its agents, the Victorian Ombudsman raised serious concerns about WorkSafe's oversight role.

Victorian Ombudsman's investigation into agent record keeping failures of 2011

- 5.30. In 2011 the Victorian Ombudsman investigated record keeping failures by WorkSafe's agents.⁴³ The investigation found that substandard record keeping practices by WorkSafe's agents had resulted in:
- 'improper conduct [by agent staff] in relation to the manipulation of unpaid accounts;
 - delays in payments to injured workers and service providers;
 - medical practitioners and other providers refusing to provide services to injured people on workers' compensation; and
 - privacy breaches'.⁴⁴
- 5.31. The 2011 Ombudsman report noted that poor record keeping at the agents hindered the effective oversight and auditing of their management of claims. The investigation found that poor record keeping was a result of inadequate file

37 WorkSafe 2013 (n 36) 9.

38 WorkSafe 2013 (n 36) 17. See generally 17-19.

39 WorkSafe 2013 (n 36) 17-19.

40 WorkSafe 2013 (n 36) 20-23.

41 WorkSafe 2013 (n 36) 23-25.

42 The 2016-2021 agreements were examined in Chapter 4.

43 Victorian Ombudsman, *Investigation into record keeping failures by WorkSafe agents* (Report, 2011) ('Victorian Ombudsman 2011').

44 Victorian Ombudsman 2011 (n 43) 53.

maintenance, inadequate understanding of statutory obligations and outdated information technology systems.⁴⁵

- 5.32. In addition, the 2011 report concluded that ‘many examples’ of poor record keeping by WorkSafe’s agents made for ‘poor or delayed decision making’ which had in turn, ‘... resulted in detriment to injured workers’.⁴⁶ The Ombudsman noted that ‘while WorkSafe operates an outsourcing model for its WorkCover claims, it still retains the primary responsibility for the efficient and effective operation of the scheme’.⁴⁷
- 5.33. In its response to the 2011 report, WorkSafe disagreed ‘with the implied message that management of the total scheme and of our Agents is substantially inadequate...’.⁴⁸ WorkSafe added that, whilst it recognised ‘that there are still opportunities for improvement, we believe the workers’ compensation scheme operates better than it ever has in the past’.⁴⁹ That observation was made only five years before the many systemic problems with the operation of the scheme that were revealed by the 2016 Ombudsman report.

Victorian Ombudsman’s investigation into the management of complex claims of 2016

- 5.34. The first investigation of the management of complex claims by the Victorian Ombudsman was conducted in 2015-16 and the report was published in September 2016. The Ombudsman had received over 500 complaints about workers’ compensation in the previous year.⁵⁰ The announcement that the subject was to be investigated prompted over 50 people to contact her office with offers of help, a response described in the report as ‘impassioned’.⁵¹ The same could be said for the many submissions I have received in conducting the present Review.
- 5.35. The investigation examined the five WorkSafe agents’ handling of a range of workers’ compensation claims. What these claims had in common was ‘the

45 Victorian Ombudsman 2016 (n 26) 4.

46 Victorian Ombudsman 2011 (n 43) 5.

47 Victorian Ombudsman 2011 (n 43) 53.

48 Victorian Ombudsman 2011 (n 43) 54.

49 Victorian Ombudsman 2011 (n 43) 54.

50 Victorian Ombudsman 2016 (n 26) 4.

51 Victorian Ombudsman 2016 (n 26) 4.

- complexity of the case and, in the overwhelming majority, the fundamental unfairness of the process [the workers had] experienced’.⁵²
- 5.36. The 2016 report was highly critical of all five agents. It concluded that they had all:
- engaged in unreasonable decision-making including by selectively using evidence especially medical evidence;⁵³
 - maintained unreasonable decisions at conciliation;⁵⁴
 - decided cases contrary to binding Medical Panel opinions;⁵⁵
 - allowed employers to improperly influence their decision-making;⁵⁶ and
 - provided inadequate internal review processes.⁵⁷
- 5.37. The Ombudsman accepted, as do I, that as ‘commercial entities, it is reasonable for WorkSafe agents to expect to make a profit, and the financial reward and penalty measures in agent contracts are intended to act as a disincentive for poor agent performance’.⁵⁸ However, the Ombudsman concluded that the evidence of unreasonable decision making by agents, including evidence disclosed by a number of internal agent emails, ‘strongly suggests that in disputed and complex matters the financial measures are encouraging a focus on terminating and rejecting claims to achieve the financial rewards’.⁵⁹
- 5.38. The report also referred to disturbing evidence that ‘four of the five agents manipulated, or their staff contemplated manipulating, claims in order to achieve the financial rewards or avoid penalties’.⁶⁰
- 5.39. The report concluded that:
- The evidence to this investigation showed genuine hardship and distress to complainants and others whose cases we examined, and some compelling evidence of agents gaming the system.⁶¹

52 Victorian Ombudsman 2016 (n 26) 4.

53 Victorian Ombudsman 2016 (n 26) 7.

54 Victorian Ombudsman 2016 (n 26) 8.

55 Victorian Ombudsman 2016 (n 26) 8-9.

56 Victorian Ombudsman 2016 (n 26) 9.

57 Victorian Ombudsman 2016 (n 26) 9

58 Victorian Ombudsman 2016 (n 26) 9.

59 Victorian Ombudsman 2016 (n 26) 9.

60 Victorian Ombudsman 2016 (n 26) 10.

61 Victorian Ombudsman 2016 (n 26) 13. This is not the only example of a review in recent years to refer to agents gaming WorkSafe’s incentives system. See, eg, Victorian Ombudsman 2011 (n 43) 53.

Improving the experience of injured workers

- 5.40. The evidence was ‘too strong to be explained away as a few ‘bad apples spoiling the barrel’..⁶² On the contrary, because the case studies ‘revealed poor behaviour by all five agents, [this] indicates forcefully that the system does not work well at this end of the spectrum’..⁶³
- 5.41. However, the Ombudsman noted that the investigation had not extended ‘to the entire WorkSafe claims management system and the evidence of this investigation does not indicate that it is broken’..⁶⁴
- 5.42. In their responses to the draft 2016 report, each of the agents accepted that the investigation ‘identified concerns with their handling of workers compensation claims and that there [were] opportunities for improvement’..⁶⁵ However, they each noted that the cases which had been examined by the Ombudsman ‘represent a small sample of the significant number of claims they manage each year ... and do not represent typical behaviour by the agents’..⁶⁶
- 5.43. The report was also critical of WorkSafe’s oversight of its agents. The Ombudsman noted that, although agents are responsible for their own decision-making, ‘they are also responding to incentives in the scheme which must be recalibrated to address the issue my investigation raises’..⁶⁷
- 5.44. The report noted that, although it delegates its claims management functions and powers to agents, WorkSafe ‘remains responsible for overseeing the agents’ performance against scheme objectives, and ensuring that appropriate compensation is paid to injured workers as expeditiously as possible’..⁶⁸
- 5.45. The particular deficiencies in WorkSafe’s oversight identified in the report included:
- the financial rewards and penalties which were found to ‘provide greater rewards to agents for terminating claims, without sufficient incentive for agents to make good quality decisions’; ⁶⁹ and

62 Victorian Ombudsman 2016 (n 26) 5.

63 Victorian Ombudsman 2016 (n 26) 13.

64 Victorian Ombudsman 2016 (n 26) 156.

65 Victorian Ombudsman 2016 (n 26) 168.

66 Victorian Ombudsman 2016 (n 26) 168. The responses from the agents are at 168-171.

67 Victorian Ombudsman 2016 (n 26) 156.

68 Victorian Ombudsman 2016 (n 26) 11.

69 Victorian Ombudsman 2016 (n 26) 11.

Improving the experience of injured workers

- inadequacies in WorkSafe’s audits of decisions and particularly a failure to direct agents to change their decisions when an audit found they were flawed.⁷⁰
- 5.46. The report also found that WorkSafe did not respond adequately to ‘stakeholder feedback’ including feedback from the Accident Compensation Conciliation Service and from injured workers. Such failures represented ‘missed opportunities to identify and resolve issues with agent decision-making and practices’.⁷¹
- 5.47. Significantly, the Ombudsman found that:
- By rejecting claims without adequate supporting evidence and maintaining unsustainable decisions, agents appeared on occasions to have ‘acted unreasonably and unjustly’;⁷²
 - By acting inconsistently with a binding Medical Panel opinion and failing to maintain accurate records, agents appeared on occasions to have acted in a way that was ‘wrong’ within the meaning of the *Ombudsman Act 1973 (Vic)*;⁷³ and
 - By having inadequate systems in place in its oversight of complex claims, WorkSafe appeared to have ‘acted in a manner that was wrong’ within the meaning of the *Ombudsman Act 1973 (Vic)*.⁷⁴
- 5.48. In her response to the draft report dated 25 August 2016, WorkSafe’s CEO Ms Amies, was critical of the report. She said that the Ombudsman’s proposed conclusions ‘substantially overreach the limited evidence considered in the course of [the] investigation’.⁷⁵
- 5.49. Ms Amies wrote that ‘[w]e particularly object to [the] conclusion that agents may have acted contrary to law or that WorkSafe appears to have acted in a way that was “wrong”’.⁷⁶

70 Victorian Ombudsman 2016 (n 26) 12.

71 Victorian Ombudsman 2016 (n 26) 142.

72 Victorian Ombudsman 2016 (n 26) 161.

73 Victorian Ombudsman 2016 (n 26) 161.

74 Victorian Ombudsman 2016 (n 26) 161.

75 Victorian Ombudsman 2016 (n 26) 165.

76 Presumably the draft report had concluded that the agents had acted in a manner that was ‘contrary to law’. If so, this was changed to ‘unreasonably and unjustly’ in the final report. See Victorian Ombudsman 2016 (n 26) 166.

Improving the experience of injured workers

5.50. Ms Amies went on to point out the overall satisfaction levels recorded in the monthly survey of injured workers (83.9% in the 2014 financial year and 86.2% in the 2016 financial year).⁷⁷

5.51. The Ombudsman made 17 recommendations. Two were directed to the government and concerned the dispute resolution process. The remaining 15 were directed to WorkSafe and proposed several changes to the means by which it oversees its agents. They included:

- Improving the complaints handling process;⁷⁸
- Issuing written directions to agents to alter decisions;⁷⁹
- Reviewing the weightings given to financial reward and penalty measures to focus more on good quality decision-making;⁸⁰
- Amending its audit tools;⁸¹ and
- Changing the Independent Medical Examiner system.⁸²

5.52. WorkSafe accepted all the recommendations directed to it. In its 2019 annual report, it reported that it had 'implemented all 15 recommendations from the Victorian Ombudsman 2016 report...'.⁸³

5.53. In a 2020 report, the Ombudsman noted that 'despite the *apparent* implementation of my recommendations, complaints continued, raising the same themes: unreasonable decision making by agents, and inadequate oversight by WorkSafe'.⁸⁴ As the Ombudsman noted:

...an unenthusiastic response to an Ombudsman report without an acknowledgement of failings or desire to tackle them means the issue simply does not go away.⁸⁵

5.54. The Ombudsman's conclusions in the 2016 report are significant. After summarising the faults that she had found, she stated:

77 Victorian Ombudsman 2016 (n 26) 166.

78 Victorian Ombudsman 2016 (n 26) 162 rec 4.

79 Victorian Ombudsman 2016 (n 26) 162 rec 7.

80 Victorian Ombudsman 2016 (n 26) 162 rec 9.

81 Victorian Ombudsman 2016 (n 26) 163 recs 10-11.

82 Victorian Ombudsman 2016 (n 26) 163 recs 14-16.

83 WorkSafe Victoria, *Annual Report 2018-19* (Report, 2019) 43.

84 Victorian Ombudsman, *Ombudsman's Recommendations - Third Report* (Report, June 2020) 72 (emphasis added) ('Victorian Ombudsman 2020').

85 Victorian Ombudsman 2020 (n 84) 5.

WorkSafe has begun addressing many of these issues, and we have already seen improvements since my investigation began in 2015. This work must go on: the cases we investigated are not merely files, numbers or claims; they involved people's lives, and the human cost should never be forgotten.⁸⁶

Victorian Ombudsman's follow-up investigation into the management of complex claims of 2019

5.55. Despite the cautious optimism she had expressed in her 2016 report and her view that the claims management system was not 'broken', the Ombudsman commenced a further investigation into the same subject matter less than two years later.⁸⁷ The Ombudsman for the first time launched a fresh investigation into an issue that she had previously investigated. The significance of this can hardly be overstated and is best captured by the following extract from the foreword to the 2019 report:

Does anything change after an Ombudsman investigation?

In almost every case I have dealt with in my five years in the role the answer is yes, and meaningfully so: unfair laws, policies and procedures have been replaced, new systems have been introduced, in some cases thousands of dollars have been paid to people wrongfully disentitled.

In 2016 I tabled a report into WorkSafe agents' handling of complex claims, which concluded that while the whole system was not broken, the handling of complex claims – the most difficult and expensive – needed fundamental reform. The report was widely welcomed by many and WorkSafe accepted all 15 recommendations made to it, with the support of the responsible Minister.

But did anything change?

Complaints to the Ombudsman can be a good indicator. In the case of WorkSafe complaints, despite the implementation by WorkSafe of all 15 recommendations, the complaints have continued, raising the same themes: unreasonable decision making by agents, inadequate oversight by WorkSafe.

While I monitor the implementation of all my recommendations, this is the first time I have launched a fresh investigation into the same issue. All Ombudsman complaints involve people's individual stories, but the WorkSafe complaints were

⁸⁶ Victorian Ombudsman 2016 (n 26) 5.

⁸⁷ The second investigation commenced in May 2018: Victorian Ombudsman, *WorkSafe 2: Follow-up Investigation into the Management of Complex Workers' Compensation Claims* (Report, December 2019) 4 ('Victorian Ombudsman 2019').

Improving the experience of injured workers

and are particularly painful. I said in 2016 these cases involve people's lives, and the human cost should never be forgotten; that human cost continues to this day.

I launched this second investigation in May 2018 on the back of a continued influx of complaints and anecdotal evidence that not enough had changed. Sadly, that has proven to be true.⁸⁸

- 5.56. The result of that further investigation was published in December 2019. The complaints that triggered the first investigation continued despite all 15 recommendations which had been directed to WorkSafe having either been implemented or progress being made to implement them.⁸⁹ The Ombudsman received nearly 700 complaints about WorkSafe and its agents in 2017-18 and about 800 in 2018-19.⁹⁰ And the complaints raised the same themes: 'unreasonable decision making by agents, inadequate oversight by WorkSafe'.⁹¹
- 5.57. The 2019 investigation, which was also an 'own motion' investigation under section 16A of the *Ombudsman Act 1973* (Vic), was more comprehensive than the earlier one. This was presumably in response to the concerns, noted above, that were raised about the depth and quality of the 2016 investigation.
- 5.58. The 2019 review involved a broad range of investigatory steps including:
- An in-depth review of 102 complex claim files, including many that were randomly selected;⁹²
 - An examination of the changes effected by WorkSafe in response to the 2016 report's recommendations;
 - A review of how WorkSafe had handled 51 complaints about agents and IMEs in 2017-18;
 - Consideration of the email records of 20 agent staff across a period of three and a half months;
 - Written submissions from injured workers or their support persons, the Police Association of Victoria, an academic involved in workers' compensation research and a law firm which acts for injured workers;
 - Consideration of complaints received by the Ombudsman in 2017-18; and

88 Victorian Ombudsman 2019 (n 87) 4. In June 2020, the Ombudsman described her 2019 report as 'long, painful and even more censorious': Victorian Ombudsman 2020 (n 84) 5.

89 WorkSafe did not support the two 2016 recommendations directed to the government. See Victorian Ombudsman 2019 (n 87) 13.

90 Victorian Ombudsman 2019 (n 87) 14.

91 Victorian Ombudsman 2019 (n 87) 4.

92 The claims that were reviewed in the earlier investigation were 'selected based on concerns and complaints about agents' handling'. See Victorian Ombudsman 2019 (n 87) 15.

- Meetings with 16 witnesses including seven conciliation officers.⁹³
- 5.59. The report also contains 59 case studies in which the experiences of 51 injured workers and their families are described.⁹⁴
- 5.60. The Ombudsman concluded that, compared to her earlier investigation, little had changed and, in some respects, the position had become worse:
- unreasonable decision making by agents on complex claims had continued with the same issues previously identified ('cherry picking' evidence and 'doctor shopping');
 - maintaining decisions at conciliation which were merely 'arguable' but had no reasonable prospect of success at court; and
 - terminating workers' entitlements without sufficient evidence.⁹⁵
- 5.61. In addition, two new issues were uncovered. The first involved the inappropriate use of surveillance of workers by agents. The second concerned the inappropriate use of return to work non-compliance notices.⁹⁶
- 5.62. The report also concluded that WorkSafe's oversight of agents had not improved significantly. Although WorkSafe had made a number of changes to its oversight mechanisms since 2016, it was 'still not optimally using them to address unreasonable agent decision making on individual complex claims and to identify and respond to systemic issues'.⁹⁷ Further, while WorkSafe had improved its auditing of agents, it had 'not held agents accountable for unsustainable decisions identified through the audits'.⁹⁸
- 5.63. The report reached the following important conclusion about WorkSafe and the Victorian workers' compensation scheme:

...the investigation has shown that workers' experience of the scheme is most significantly affected by unreasonable agent decision making. WorkSafe appears reluctant to adequately deal with this when it is brought to their attention, based on its view that agents have delegated authority to manage claims and that conciliation

93 Victorian Ombudsman 2019 (n 87) 15–16.

94 Victorian Ombudsman 2019 (n 87) 18.

95 Victorian Ombudsman 2019 (n 87) 219.

96 Victorian Ombudsman 2019 (n 87) 40–47, 83–107 respectively. The process by which agents issue 'return to work non-compliance notices' is explained at 84.

97 Victorian Ombudsman 2019 (n 87) 221

98 Victorian Ombudsman 2019 (n 87) 221.

Improving the experience of injured workers

and the courts are the appropriate mechanisms to ensure workers are appropriately compensated.⁹⁹

5.64. Significantly, the Ombudsman added the following:

It begs the question whether WorkSafe feels beholden to the agents, dependent on their participation to deliver a financially viable scheme.¹⁰⁰

5.65. The report reached the following ultimate conclusions:

The investigation revisited issues the Ombudsman identified in 2016, to establish whether the Ombudsman's recommendations had improved agent decision making and the effectiveness of WorkSafe's oversight of complex claims.

While these recommendations resulted in some changes to policies, procedures and practices, the evidence suggests that they were not enough to change agent behaviour and stop unreasonable decision making on complex claims.¹⁰¹

After two investigations by the Ombudsman and a number of reviews commissioned by WorkSafe, *the evidence points to this being a systemic problem*. In too many complex claims, the system is failing to achieve one of the scheme's objectives under the [WIRC Act], which is to ensure appropriate compensation be paid to injured workers 'in the most social and economically appropriate manner, as expeditiously as possible'.¹⁰²

5.66. After referring to evidence of emails in which agent staff were congratulated for terminating claims and others which 'discussed the monetary value to the agent of terminating individual claims', the report stated:

This evidence, when combined with the extent of continued unreasonable decision making by agents on complex claims identified by this investigation, raises questions about the suitability of commercial organisations to manage these claims. As distinct from WorkSafe as the statutory authority charged with managing the scheme, agents have a vested interest in the outcome of individual claims arising from the commercial nature of their organisations, as well as the financial reward and penalty measures.¹⁰³

5.67. The Ombudsman's ultimate conclusion was that, 'as piecemeal changes have proven unsuccessful in tackling these problems, more significant changes to the

99 Victorian Ombudsman 2019 (n 87) 222.

100 Victorian Ombudsman 2019 (n 87) 222.

101 Victorian Ombudsman 2019 (n 87) 219.

102 Victorian Ombudsman 2019 (n 87) 219 (emphasis added).

103 Victorian Ombudsman 2019 (n 87) 221.

way complex claims are managed are needed to ensure better outcomes for these most vulnerable injured workers’¹⁰⁴

5.68. In light of the above findings and the failure of her 2016 report to effect real change, the Ombudsman concluded that ‘[n]othing short of wholesale changes to the system will address the issues identified by both the 2016 investigation and the current one’¹⁰⁵ These ‘wholesale changes’ were to be achieved by implementation of two recommendations directed to the Victorian Government to:

1. Commission an independent review of the agent model to determine how and by whom complex claims should be managed, taking into account:
 - a. the need to ensure appropriate compensation is provided to injured workers, as well as the financial viability of the scheme;
 - b. the experience of other accident compensation schemes, including Victoria’s transport accident scheme ... and other national and international workers compensation jurisdictions’;
2. Introduce a new dispute resolution process which: allows for binding determinations on the merits of claim decisions, ... is inexpensive; and provides timely outcomes.¹⁰⁶

5.69. In relation to Recommendation 1, the Ombudsman noted that Victoria’s outsourced agent model, while common in Australia, is not universally followed and there are ‘many other international schemes’ in which ‘claims are managed in-house by the relevant statutory authority’¹⁰⁷

5.70. Noting that ‘the financial viability of the scheme is imperative’, the Ombudsman considered that ‘a balance must be struck so that the scheme can achieve both objectives of financial sustainability and appropriate compensation for injured workers’¹⁰⁸ At present, the report concluded that ‘the system is failing to achieve the latter in too many complex claims’¹⁰⁹

5.71. Recommendation 2 was that the government ‘introduce a new dispute resolution process which allows for binding determinations on the merits of claims

104 Victorian Ombudsman 2019 (n 87) 219.

105 Victorian Ombudsman 2019 (n 87) 11 (emphasis added).

106 Victorian Ombudsman 2019 (n 87) 224.

107 Victorian Ombudsman 2019 (n 87) 224.

108 Victorian Ombudsman 2019 (n 87) 224.

109 Victorian Ombudsman 2019 (n 87) 224.

- decisions...'.¹¹⁰ As described in Chapter 3, the government has introduced legislation to allow ACCS make binding determinations for workers' compensation disputes which are not resolved by conciliation, to take effect in 2023.
- 5.72. In addition to the two recommendations directed to the government, the report made a further 13 recommendations directed to WorkSafe Victoria. The Ombudsman explained that it was necessary for action to be taken to address the 'immediate issues' identified by the investigation and that it would take time for the government to implement recommendations one and two.¹¹¹
- 5.73. Recommendations 3–9 concerned WorkSafe's oversight of the agents and included that WorkSafe:
- Establish a dedicated business unit to independently review dispute decision when requested by workers following unsuccessful conciliation;
 - Amend its quality decision making audit procedure;
 - Update its claims manual; and
 - Increase its oversight of its agents.¹¹²
- 5.74. Recommendations 10–15 were concerned with Independent Medical Examiners.¹¹³
- 5.75. WorkSafe provided two responses to the draft report. The first was from the outgoing Chief Executive, Ms Claire Amies. Ms Amies recognized that 'the service delivery model for complex claims requires wholesale change'. She referred to the 'strenuous efforts' WorkSafe had made within the existing claims model to 'focus on continuous improvement of its management of complex claims... including implementing in full the recommendations made in your 2016 report'.¹¹⁴
- 5.76. In this regard, Ms Amies referred to 'WorkSafe 2030' which was 'a wholesale transformation of the way in which WorkSafe operates and delivers services in the community'. Under 'WorkSafe 2030', every injured worker will be provided

110 Victorian Ombudsman 2019 (n 87) 224.

111 Victorian Ombudsman 2019 (n 87) 225.

112 Victorian Ombudsman 2019 (n 87) 225-226.

113 Victorian Ombudsman 2019 (n 87) 227.

114 Victorian Ombudsman 2019 (n 87) 228.

- with ‘a tailored service to ensure they recover and return to work as soon as it is safe to do so’.¹¹⁵
- 5.77. However, just as she had done in relation to the 2016 report, Ms Amies took issue with the conclusion in the 2019 report that there was a fundamental systemic problem with the management of complex claims. In particular, she took issue with the ‘preliminary conclusion that Agents are motivated only by financial or commercial gain’.¹¹⁶
- 5.78. The second WorkSafe response to the draft 2019 report was from the incoming Chief Executive, Mr Colin Radford.¹¹⁷ It was more conciliatory in tone and noted the ‘very comprehensive investigation’ that the Ombudsman had completed.¹¹⁸
- 5.79. The former Minister for Workplace Safety, Hon Jill Hennessy MP informed the Ombudsman that she was ‘disturbed by the findings’ and shared the Ombudsman’s concern that ‘currently the workers compensation scheme is failing too many injured workers with complex claims’.¹¹⁹ The Minister committed to implementing recommendation one by commissioning an independent review of the agent model. This is that review.
- 5.80. Two agents, CGU and Gallagher Bassett, once again responded that the sample of claims examined by the Ombudsman was not representative. CGU described the sample as a ‘narrow tranche of claims’ and pointed to the high level of ‘customer satisfaction’ revealed by its surveys.¹²⁰ Gallagher Bassett informed the Ombudsman that it was ‘deeply concerned about a number of aspects of the methodology of the investigation’ and described the draft report as ‘disappointing’.¹²¹

Adequacy of WorkSafe’s response to the 2019 Ombudsman’s report

- 5.81. I have concluded that, in contrast to its response to the 2016 Ombudsman’s report, WorkSafe has done more since the 2019 report was published than the bare minimum it needed to do to be in a position to say it had implemented the

115 Victorian Ombudsman 2019 (n 87) 228.

116 Victorian Ombudsman 2019 (n 87) 229.

117 Victorian Ombudsman 2019 (n 87) 242-243.

118 Victorian Ombudsman 2019 (n 87) 242.

119 Victorian Ombudsman 2019 (n 87) 240.

120 Victorian Ombudsman 2019 (n 87) 232-233.

121 Victorian Ombudsman 2019 (n 87) 236.

- recommendations. Its actions since December 2019 indicate that it is seeking to give effect to both the letter and the spirit of the recommendations.
- 5.82. In reaching this conclusion, I have considered two assessments of WorkSafe’s implementation initiatives.
- 5.83. The first was by the Ombudsman herself in June 2020. The Ombudsman contrasted the ‘unenthusiastic response’ by WorkSafe to her 2016 report with its ‘much more robust’ pledges to ‘address the issues within its responsibility’..¹²² Noting that ‘real system reform will take some time’, the report observed that ‘WorkSafe’s initial actions are encouraging’..¹²³ The report concluded that the Ombudsman does not want to have to investigate this issue again but ‘the impact on people’s lives means it is too important not to get right’..¹²⁴
- 5.84. In her examination of the 13 recommendations directed to WorkSafe, the Ombudsman observed that ‘WorkSafe has made progress to implement each of the recommendations ... and is on track to finalise implementation by the end of 2020’..¹²⁵
- 5.85. The second assessment was by PwC, who WorkSafe engaged in 2020 to ‘evaluate the design of WorkSafe’s arrangements to monitor and review claims decisions made by Agents, in light of the December 2019 Ombudsman Victoria report ...’..¹²⁶ Importantly, the review was limited to an examination of the ‘design of arrangements’ and did not consider the operating effectiveness of the controls or an assessment of the appropriateness of the outcomes of WorkSafe’s audits..¹²⁷
- 5.86. The focus of the review was WorkSafe’s response to Recommendations 4 and 7 in the Ombudsman’s 2019 report.
- 5.87. Recommendation 4 was that:
- [WorkSafe] amend its quality decision making audit procedure to ensure that:
- a) Only sustainable decisions pass;
- b) Unsustainable decisions identified through the audit process are overturned..¹²⁸

122 Victorian Ombudsman 2020 (n 84) 5.

123 Victorian Ombudsman 2020 (n 84)

124 Victorian Ombudsman 2020 (n 84) 5.

125 Victorian Ombudsman 2020 (n 84) 73.

126 PwC, *WorkSafe Victoria – Review of WorkSafe Oversight of Agent Decision-Making* (Report, December 2020), 23 ('PwC 2020').

127 PwC 2020 (n 126) 24.

128 Victorian Ombudsman 2019 (n 87) 225.

5.88. Recommendation 7 was that:

[WorkSafe increase its] oversight of the following claims management activities by agents through targeted 'health checks' or audits:

(a) agents' use of surveillance;

(b) mental injury claims rejected under s 40(1) of the WIRC Act (reasonable management ground);

(c) Return to work non-compliance notices; [and]

(d) terminations of 'top up' weekly payments provided under s 165 of the WIRC Act 2013....¹²⁹

5.89. The report comprehensively examined a number of WorkSafe initiatives in response to these recommendations including:

- The expansion of the audit program to cover equal numbers of claims involving physical and mental injuries;¹³⁰
- The increase in the number and scope of audits;¹³¹ and
- The improvements in follow up controls and processes where unsustainable decisions are identified..¹³²

5.90. The consultant noted that 'feedback from agents indicates that WorkSafe is 'on the journey' of shifting decision-making behaviours towards holistic decision-making that puts the claimant at the centre (person-centred case management decision-making)'.¹³³ As part of this, WorkSafe 'is now providing a large amount of mandatory, WorkSafe-developed training to agents through its Discover platform'.¹³⁴

5.91. PwC's conclusion was:

Our review has confirmed that WorkSafe has increased its oversight of Agents since the release of the December 2019 Ombudsman Victoria report. Based on the work undertaken in line with our review scope, it is our assessment that WorkSafe has a strong oversight framework for Agent decision making....¹³⁵

129 Victorian Ombudsman 2019 (n 87) 226.

130 PwC 2020 (n 126) 12.

131 PwC 2020 (n 126) 14.

132 PwC 2020 (n 126) 16.

133 PwC 2020 (n 126) 19.

134 PwC 2020 (n 126) 19.

135 PwC 2020 (n 126) 3.

- 5.92. However, not all observers share this positive view of WorkSafe's implementation of the 2019 recommendations. I understand that the Minister for Workplace Safety's Monitoring and Oversight Committee (MOC) has expressed concerns that the changes implemented by WorkSafe are not yet translating into changed behaviour on the part of its agents.
- 5.93. The MOC was established by the then Minister for Workplace Safety, Hon Jill Hennessy MP in October 2019. Its purpose was initially to oversee WorkSafe's implementation of recommendations from the 2016 Ombudsman's report. After the publication of the 2019 report, MOC's scope was extended to include implementation of the recommendations contained in that report.
- 5.94. The box below describes what the Review was told by many injured workers about how they feel when they interact with the workers' compensation system.

Workers feel they are treated like criminals

Injured workers repeatedly told me that in the behaviour of agents and their experiences with the Victorian workers' compensation system, they were made to feel as though they were a criminal.

In telephone calls with the Review, workers told me:

'People who get hurt [at work] are not criminals and to be called fraud is degrading...'

'The only thing they cared about is getting me off the system, and I have been treated as a criminal.'

'I know some cases are fraud claims but it's hard to be treated like a criminal...'

Many workers and their families used the Review's online survey to share their experiences. The partner of an injured worker told the Review:

The person who has spent years helping the company to grow their business, has been loyal and honest turned up to work and done their jobs diligently, contributed to the community by being employed often doing meaningless back breaking work, paid their taxes. Instead they are treated like scum and criminals and humiliated, tested, prodded and made to jump through hoops to get the support they need. Often they just give up fighting.¹³⁶

A worker's response to the Review's online survey said:

136 Survey response (support person) 263624.

Improving the experience of injured workers

My experience of IME sends me into a state of anxiety as does my last medical panel where I felt like a criminal. I was treated as if I was lying even though I had medical evidence from my surgeon the injury was secondary to my original injury due to an altered gait...¹³⁷

Another survey respondent described:

I found my experience stressful. As well as things I need being rejected, as well as (being) treated like a criminal, a number not person. Having to fight injury and Workcover for any treatment or help...¹³⁸

¹³⁷ Survey response (worker) 261550.

¹³⁸ Survey response (worker) 261444.

Part B – Submissions and research

6. Identification of complex claims

'The case managers don't have psychiatric qualifications, but it's clear that they don't require it when the insurer is more about profit and to reduce cost'.

'Harry', injured worker

Key points

- Complex claims can and should be identified well in advance of 130 weeks. A definition of complex claims based on 130 weeks is too narrow and time should not be the only measure.
- Once a claim reaches 130 weeks, the chances of the injured worker returning to health and work are much reduced.
- Early identification of complex claims is critical—successful interventions to improve health outcomes and provide for a sustained return to work are most likely if appropriate treatment and support occurs early.
- Biopsychosocial models and tools are effective in defining and identifying complexity.
- There is a need to balance the identification of complexity with the timeframe for effective intervention. A best practice statement from Monash University's Insurance, Work and Health Group describes the optimal time for a range of interventions as 'an identified therapeutic window of six to twelve weeks post injury'.¹

¹ Ross Iles et al, Insurance, Work and Health Group, Faculty of Medicine, Nursing and Health Sciences, *Monash University*, 'Risk Factor Identification for Delayed Return to Work Best Practice Statement' (Research Report, April 2018) 21.

Purpose of the chapter

- 6.1. The purpose of this chapter is to discuss *how* and *when* to identify features of workers' compensation claims where complexity poses a risk to the worker's recovery outcomes.
- 6.2. To achieve optimal recovery and return to work outcomes, evidence-based identification of risk factors needs to be coupled with intervention tailored to address those risk factors. The need to match identification of risk with tailored intervention is discussed in Chapter 7.
- 6.3. This chapter focuses on how and when to identify claims with risk factors to enable the provision of timely, targeted, and tailored early intervention. To inform my position on how to identify 'at-risk' claims, I explore:
 - the evidence provided to me during consultations, in submissions and relevant research on why certain factors can indicate risk of complexity;
 - current risk identification (triage tools) used in the Victorian scheme;
 - the biopsychosocial model and tools for risk identification;
 - other compensation schemes and elements of risk identification in these schemes that reflect best practice; and
 - at what stage in the claim lifecycle, a claim should be assessed and reassessed for complexity.
- 6.4. I conclude that the existing risk identification (triage) models used in the Victorian scheme are not effective in providing risk identification that enables risk to be matched with needs-based intervention.

What is a 'complex claim'?

Terms of Reference

- 6.5. Paragraph 13 of the Terms of Reference states that '...complex claims are defined as those where the injured worker has received 130 weeks or more of weekly payments (including claims that were suspended or terminated during this period)'..²
- 6.6. This definition needs to be read together with paragraph 14 of the Terms of Reference which states that 'irrespective of the complexity of a claim, the Review

² Terms of Reference, para 13.

should consider the personal circumstances of claimants which may ultimately contribute to them having 'complex claims', as defined at 130 weeks'.³

- 6.7. Claims that progress beyond 130 weeks 'have longer decision timelines, a higher rate of rejection, involve greater lengths of time off work and have a higher rate of disputation over agent decisions'.⁴
- 6.8. Most claims do not extend beyond 130 weeks and are not contentious.⁵
- 6.9. WorkSafe's 2020 annual report stated that 54 per cent of injured workers returned to work within 13 weeks, 72 percent before 26 weeks and 88 per cent prior to 52 weeks.⁶ A relatively small number of injured workers, 3.5 per cent, remained on weekly benefits at 134 weeks.⁷
- 6.10. Claims that could be described as complex make up around 20 per cent of new claims but around 90 per cent of the liabilities.⁸

Risk identification for features leading to complexity

- 6.11. In acquitting paragraphs 13 and 14 of the Terms of Reference it was essential to consider why claims become complex, in the sense of extending beyond 130 weeks in the scheme, and how to prevent this. In accordance with the purpose of workers' compensation and rehabilitation, the aim should be to avoid delays in returning a person to their pre-injury life.
- 6.12. I considered research on risk identification and information received through consultation and submissions.
- 6.13. My conclusion is that the focus needs to be on early risk identification of factors that may delay a person's return to their pre-injury life. This must be combined with best practice intervention to address identified risk factors.
- 6.14. Early identification of risk factors that may delay a person's return to their pre-injury life combined with best practice intervention provides the best outcomes for workers and employers. Equally, it will ensure the financial viability of the

³ Terms of Reference, para 14.

⁴ Terms of Reference, para 5.

⁵ Victorian Ombudsman, *Investigation into the Management of Complex Workers Compensation Claims and WorkSafe Oversight* (Report, September 2016) 4 ('Victorian Ombudsman 2016').

⁶ WorkSafe Victoria, *Annual Report 2020* (Report, October 2020) 138 ('WorkSafe Annual Report 2020'). Weekly benefit durations are commonly used as a proxy for return to work.

⁷ WorkSafe Annual Report 2020 (n 6) 138.

⁸ Victorian Ombudsman 2016 (n 5) 6.

scheme. As noted above, claims that could be described as complex make up around 20 per cent of new claims but around 90 per cent of the liabilities.⁹

Responses on identifying complex claims

- 6.15. This section describes what submissions said about risk identification of features leading to complexity and the best timing for making this assessment both initially, and during the life of a claim.
- 6.16. A theme that ran through many of the consultations and responses to the discussion paper was that there is no simple definition of a complex claim. A point repeatedly made in consultations and submissions was that there were well known factors, which if present, are predictors of ultimate complexity. These factors include the injury being either a primary or secondary mental injury; the nature or severity of the injury; the personal and social circumstances of the worker; and the relationship between the worker and their employer.
- 6.17. Importantly, submitters noted that the way in which a claim is managed can itself convert a 'simple claim' into one that is complex. Where the relationship between the worker, their employer and the agent is adversarial in nature, this can prolong recovery and lead to complexity, as outlined at 6.38.
- 6.18. These factors point to the challenges associated with carving out with any precision a category of claims that can be designated 'complex claims' to be managed under separate arrangements.

'There was no human touch for anything I was involved in... I feel that agents want to spend the bare minimum to get you back to work. It's totally wrong. If I had received physio after my first surgery, instead of them pushing me back into work, then my second injury [might not have happened]'.

'Michael', injured worker

⁹ Victorian Ombudsman 2016 (n 5) 6.

Complex claims can and should be identified well in advance of 130 weeks

- 6.19. As described above, the Terms of Reference for the Review define complex claims as ‘those where the injured worker has received 130 weeks or more of weekly payments (including claims that were suspended or terminated during this period)’.¹⁰
- 6.20. The view that 130 weeks is not a useful point in time to identify complex claims was made overwhelmingly in both submissions and consultations. It was described as:
- an ‘administrative definition’;¹¹
 - ‘not a good definition when looking at “systemic adjustments”’;¹²
 - ‘means that the horse will often have bolted’;¹³
 - ‘a strongly financially driven basis for assessing “complexity” and the services associated with this category’.¹⁴
- 6.21. Almost uniformly, individuals and groups across all interest groups said that:
- A 130 week definition of complex claims is too narrow;¹⁵
 - Identifying a claim as complex at 130 weeks is too late;¹⁶
 - Duration should not be the only measure of complexity;¹⁷
 - Claims at risk of complexity can be identified well in advance of 130 weeks and in many cases, after a few weeks;¹⁸
 - Assessments of complexity must consider the individual factors and circumstances of the injured worker;¹⁹ and
 - Early identification of complexity is critical—successful interventions to improve health outcomes and provide for a sustained return to work, are most likely if appropriate treatment and support occurs early.²⁰

10 Terms of Reference, para 13.

11 Submission DP25 (Dr. Robyn Horsley) 2.

12 Submission DP11 (ALA) 7.

13 Submission DP45 (Slater and Gordon Lawyers) 6.

14 Submission DP5 (Appropriate Measures) 1.

15 See, eg, Submissions DP1 (ACCS), DP7 (AMIEU), DP16 (ASU), DP32 (IEU), DP49 (UFU), DP51 (Uniting Victoria).

16 See, eg, Submissions DP4 (ANMF), DP6 (RACP), DP45 (Slater and Gordon Lawyers).

17 See, eg, Submissions DP11 (ALA), DP12 (AMWU), DP39 (LIV), DP46 (Suncorp), DP54 (VTHC), DP59 (WorkSafe agent, name withheld).

18 See, eg, Submissions DP8 (ACJI Monash), DP10 (Ai Group), DP30 (HACSU).

19 See, eg, Submissions DP1 (ACCS), DP52 (VAU), DP59 (WorkSafe agent, name withheld).

20 See, eg, Submissions DP15 (ARPA), DP16 (ASU), DP41 (MBV), DP43 (RACGP).

- 6.22. Some submissions observed that, paradoxically, by the time a worker's claim reaches 130 weeks, it is a long-term claim, and not necessarily complex.²¹ Victorian Trades Hall Council observed that many of the claims Union Assist and affiliated unions deal with that exceed 130 weeks, are 'relatively simple' to resolve.²²
- 6.23. The Law Institute of Victoria submitted that the mere fact that an injured worker returns to work does not necessarily equate to their claim being less complex.²³ Similarly, Slater and Gordon Lawyers submitted that a case can exceed 130 weeks without being complex if the injured worker is recovering as expected.²⁴
- 6.24. The Accident Compensation Conciliation Service's submission summarised the concern raised by many submissions about the 130-week definition of complex claims: 'This definition captures the outcomes of complexity, but not the journey that injured workers take as their claims become complex'.²⁵
- 6.25. A submission made by a group of academic and medical professionals with extensive experience in workers' compensation, described the term 'case complexity' as referring to a much broader group of situations, people and claims, than the definition of 'complex claims' set out in the Review's Terms of Reference.²⁶ The group suggested that what is 'commonly referred to as a complex case' may include:
- a long period of incapacity or long period of treatment required;
 - all mental health claims (which was also suggested by the Police Association Victoria);²⁷
 - cases where the workplace is uninterested or disengaged;
 - cases where the person is identified at higher risk of prolonged disability through early biopsychosocial screening (approximately 30% of cases);
 - cases where there are delays or disputes; and
 - cases with legal involvement.²⁸

21 See, eg, Submission DP4 (ANMF).

22 Submission DP54 (VTHC) 4.

23 Submission DP39 (LIV).

24 Submission DP45 (Slater and Gordon Lawyers).

25 Submission DP1 (ACCS) 2.

26 Submission OP7 (Expert academic and medical professional group).

27 Submission DP48 (TPAV).

28 Submission OP7 (Expert academic and medical professional group) 4.

- 6.26. Many submissions emphasised that complexity may be present at the commencement of the life of a claim or may develop over time. This means that, while a claim should be assessed for complexity initially, it should also be reassessed over time.²⁹

Factors leading to complexity

- 6.27. Submissions identified factors that will often indicate a claim is complex, or at risk of becoming complex. There was widespread agreement across interest groups on many of the factors that lead to complexity.³⁰ Numerous submissions stated that complexity often arises from a combination of factors, rather than a single factor. Factors frequently identified as linked to complexity are described below.

Nature or severity of injury, including the measures and extent of rehabilitation needed

- 6.28. The nature or severity of the injury will often be a relevant factor for assessing complexity.³¹ Submissions also suggested that some injuries can be assessed as complex claims immediately because of the severity or type of injury. Mental injuries were often cited in this regard. This was contrasted with other factors, which may mean complexity develops over time.³²
- 6.29. The Australian Lawyers Alliance submitted that some types of injuries result in complex claims because they ‘will require long term engagement with the scheme, even if weekly payments are discontinued’.³³ Examples provided were spinal injuries, psychological injuries, pain syndrome injuries, brain injuries, and some amputations.
- 6.30. The Australian Centre for Justice Innovation, Monash University suggested that severe injuries should be managed differently from the beginning of the claim.³⁴ Examples included catastrophic injury, such as spinal or brain injury and major secondary psychological conditions (sequelae). It also suggested claims could be classified by injury type instead of claim stage, referencing the Transport Accident

29 See, eg, Submissions DP8 (ACJI Monash), DP11 (ALA), DP15 (ARPA), DP16 (ASU), DP39 (LIV).

30 See, eg, Submissions DP1 (ACCS), DP4 (ANMF), DP8 (ACJI Monash), DP10 (Ai Group), DP11 (ALA), DP12 (AMWU), DP14 (APS), DP27 (Gallagher Bassett), DP30 (HACSU), DP44 (SDA), DP45 (Slater and Gordon Lawyers), DP48 (TPAV), DP54 (VTHC), DP55 (WorkSafe agent, name withheld), DP59 (WorkSafe agent, name withheld).

31 See, eg, Submissions DP5 (Appropriate Measures), DP11 (ALA), DP15 (ARPA), DP39 (LIV), DP45 (Slater and Gordon Lawyers), DP54 (VTHC), DP55 (WorkSafe agent, name withheld).

32 See, eg, Submissions DP16 (ASU), DP27 (Gallagher Bassett), DP39 (LIV), DP46 (Suncorp).

33 Submission DP11 (ALA) 7.

34 Submission DP8 (ACJI Monash).

Commission (TAC) as an example for this approach. The TAC's approach to claims management is examined at 6.119. Similarly, Counselling Appraisal Consultants Pty Ltd suggested that claims involving significant trauma, where WorkSafe is called out and/or where the injured worker is hospitalised, should be considered as potentially complex from the outset.³⁵

- 6.31. Other submissions suggested that multiple injuries may point to complexity and that co-morbid conditions, including those not directly attributable to an accident are likely to add complexity.³⁶ Claims agent Xchanging submitted that multiple injuries often require the coordination of many service providers such as GPs, surgeons, occupational therapists, occupational rehabilitation, home help and home modification services.³⁷
- 6.32. Chapter 7 describes approaches used by the TAC and the State of Washington workers' compensation scheme which I consider represent better practice to provide for the timely and effective coordination and provision of services. For example, TAC's current claims management structure is organised around client need, rather than injury type or benefit duration. This is based on evidence that poor recovery is not primarily determined by injury type and intervention must be holistic.³⁸

Mental/psychological injury (primary or secondary)

- 6.33. As at September 2020, WorkSafe advised that the proportion of mental injury claims was 17 per cent of total claims and is increasing.³⁹ An agent's submission stated that mental injury claims account for 80 per cent more claims than they did 10 years ago.⁴⁰ WorkSafe stated that '[t]ypically, workers suffering from a workplace mental injury require more care and more time away from work'.⁴¹
- 6.34. Many submissions suggested that mental injuries, whether primary or secondary, are more likely to be complex.⁴² The Shop Distributive and Allied Employees Association submitted that:

35 Submission DP21 (CAC).

36 See, eg, Submissions DP5 (Appropriate Measures), DP12 (AMWU), DP58 (Xchanging).

37 Submission DP58 (Xchanging).

38 Consultation 38 (TAC session 2).

39 Submission DP57 (WorkSafe) 5.

40 Submission DP59 (WorkSafe agent, name withheld) 10.

41 Submission DP57 (WorkSafe) 5.

42 See, eg, Submissions DP15 (ARPA), DP16 (ASU), DP54 (VTHC), DP59 (WorkSafe agent, name withheld).

These matters are complicated [in] a medical sense, as they require the consideration of a variety of psychosocial, circumstantial and biological factors. However, they are also difficult to determine in a factual sense, and decisions surrounding these claims are often the result of unscrupulous circumstance reports or unreasonable evidentiary requirements. Moreover, the consequences for mismanagement of psychological injury claims are highly significant and include the risk of suicide. Despite these risks, many agents continue to handle psychological injury claims in an irresponsible and harmful manner.⁴³

- 6.35. Submissions from three emergency service unions proposed that mental injury claims should be classified as complex.⁴⁴ They highlighted that the nature of emergency service work means there is a high incidence of post-traumatic stress disorder (PTSD) claims. They also emphasised that PTSD sustained through work results in increased difficulties in the injured worker returning to work because operational duties are associated with trauma exposure.
- 6.36. The Australian Psychological Society is the largest professional organisation for psychologists in Australia representing over 24,000 members. It suggested that the term ‘complex claim’ is ‘a euphemism for injuries involving a primary or secondary psychological injury associated with stress or traumatic stress’.⁴⁵ It submitted that the following factors make it more likely that psychological claims will become complex:
- **ongoing pain conditions** attributable to the causal event (and particularly those associated with inappropriate work practices);
 - **the failure of the insurer to promptly approve best practice interventions** to address accepted conditions (ranging from allied health treatments through to surgery);
 - **the employment-type of the injured worker** (first responders, child protection workers, mental health workers, hospital emergency department staff and white collar occupations are over-represented in complex claims);
 - **the type of event** involved in the injury;
 - **the injured workers’ experience** of whether and how their employers care for them;
 - **the prevailing organisational climate** before, during and after the injury involved; and

43 Submission DP44 (SDA) 3.

44 See, eg, Submissions DP48 (TPAV), DP49 (UFU), DP52 (VAU).

45 Submission DP14 (APS) 2.

- **misconceptions that exist in agents** around mental health.⁴⁶
- 6.37. While the Australian Psychological Society identified these features as likely to lead to complexity in psychological claims, many other submissions suggested that similar features may lead to complexity in all claims, whether psychological or physical.

Relationship with the employer/workplace

- 6.38. Numerous submissions highlighted the relationship between the injured worker and their employer as an important factor that can lead to complexity.⁴⁷
- 6.39. Complexity is likely to arise where there is an adverse relationship between the worker and their employer; for example, where there are pre-existing performance management or human resource issues, or where there is an inappropriate response by the employer when the claim is first lodged or during the claim.⁴⁸
- 6.40. Complexity may also arise where workers are disconnected from their employer or the relationship is tenuous; for example, where their employment is terminated or where the worker is casual.⁴⁹ A WorkSafe agent stated that only a small number of employers support their injured workers beyond the 52 week employer obligation period when their legislative duty to support a return to work ends, and that the number has decreased by 39% since 2010.⁵⁰
- 6.41. The relationship with the employer can also be a protective factor, reducing the likelihood of a claim becoming prolonged or complex. Protective factors include employers supporting injured workers at the time of the injury, in lodging a claim, and remaining in contact with them throughout their rehabilitation. Supportive

46 Submission DP14 (APS) 2.

47 See, eg, Submissions DP1 (ACCS), DP7 (AMIEU), DP8 (ACJI Monash), DP14 (APS), DP21 (CAC), DP27 (Gallagher Bassett), DP30 (HACSU), DP32 (IEU), DP36 (IWHG Monash), DP42 (Occupational rehabilitation provider, name withheld), DP43 (RACGP), DP46 (Suncorp), DP52 (VAU), DP54 (VTHC), DP55 (WorkSafe agent, name withheld), DP58 (Xchanging), DP59 (WorkSafe agent, name withheld).

48 See, eg, Submissions DP1 (ACCS), DP2 (Aegis), DP7 (AMIEU), DP8 (ACJI Monash), DP21 (CAC), DP30 (HACSU), DP32 (IEU), DP46 (Suncorp), DP59 (WorkSafe agent, name withheld).

49 See, eg, Submissions DP1 (ACCS), DP25 (Dr. Robyn Horsley), DP45 (Slater and Gordon Lawyers).

50 Submission DP59 (WorkSafe agent, name withheld) 10. The WorkSafe agent advised: 'The proportion of direct payments made to injured workers by Agents beyond 52 weeks is a proxy for this. Normally, Agents pay WorkCover benefits to the employers who then pay this onto the injured worker. However, when the worker-employer relationship ends or breaks down, Agents make the payments directly to the injured worker[...] there has been an increase of 39% in the proportion of workers [since 2010] that are no longer supported by their employer beyond 52 weeks of the claim.'

- employers can also provide appropriate return to work duties building both the capacity and confidence of the injured worker.⁵¹
- 6.42. Most importantly, employers that proactively approach their return to work responsibilities under Part 4 of the WIRC Act and their corresponding responsibilities to make 'reasonable adjustments' under section 20 of the *Equal Opportunity Act 2010* (Vic) can be of great assistance to injured workers.
- 6.43. Many submitters referred to the 2018 Victorian Injured Worker Survey. In phase one of that survey, long-term injured workers reported the following behaviours by some employers, which can be characterised as 'bad faith':
- discouraging claims, failing to lodge claims, or incorrectly lodging a claim for medical services but not wage replacement
 - failing to provide appropriate pay records, effectively preventing injured workers from meeting WorkSafe requirements to prove their pre-injury income
 - pressuring case managers to deny or pend and investigate claims
 - negative responses to workers when they deliver certificates of capacity
 - no assistance with return to work, or active discouragement of efforts to return to work.⁵²
- 6.44. This type of employer behaviour may result in an injured worker distrusting their employer, delays to benefits, and dispute—all factors that are associated with complexity.
- 6.45. Other employment and workplace factors which submissions linked to complexity include:
- **workplace bullying, harassment or conflict**—workers may be reluctant to raise a mental injury, preferring to lodge a claim as a physical injury—however, a failure to address any bullying or conflict means a successful return to work is unlikely;⁵³
 - **type of employment**—submissions identified both the industry type (e.g. high-risk industry) and the employment type (e.g. labour hire, casual, permanent, part-time or full-time) as relevant to assessing complexity;⁵⁴

51 See, eg, Submissions DP8 (ACJI Monash), DP10 (Ai Group), DP52 (VAU).

52 E Kilgour and A Kosny, *Victorian Injured Worker Outcomes Study, Study 1 – A qualitative enquiry into outcomes for injured workers in Victoria who have longer term claims* (Research Report, April 2018).

53 See, eg, Submissions DP2 (Aegis), DP8 (ACJI Monash).

54 See, eg, Submissions DP14 (APS), DP27 (Gallagher Bassett), DP54 (VTHC).

- **employer circumstances and capacity**—the circumstances of the employer may make return to work difficult—for example, the size of the employer and, at present, COVID-19 impacts.⁵⁵

Relationship with the agent and case management

- 6.46. Complexity may arise where there is an adversarial relationship between the worker and agent. This adversarial relationship could be based on the negative experiences of the worker—for example, multiple case managers, delayed agent decision-making, delayed approval or denial of treatment, surveillance, use of multiple Independent Medical Examiners, inappropriate communication, including too much or too little communication.⁵⁶
- 6.47. Submissions also suggested that an adversarial relationship may arise through the actions of the injured worker—for example, a failure to communicate, a failure to comply with obligations, a failure to undertake treatment, or threats to the agent.⁵⁷

Duration of claim

- 6.48. As noted, almost all submissions rejected the length of time the worker has received payments as the sole factor for defining a complex claim. However, many submissions also highlighted that the longer an injured worker is not at work, the less likely they are to return to work.⁵⁸ For this reason, many submissions identified time off work as one of the factors that should be considered in assessing complexity.⁵⁹
- 6.49. Xchanging suggested that ‘longer term claims ... accumulate more complex features’.⁶⁰ Gallagher Bassett submitted that ‘the current legislation provides the framework that drives dependence on the Scheme over time. The longer a person is in receipt of compensation, they become more reliant on the Scheme’.⁶¹ Gallagher Bassett, Xchanging and two other agents all referred to the need for early interventions to motivate workers to return to work.
- 6.50. Aegis Risk Management Services (Aegis) is an insurance broker specialising in workers’ compensation. Aegis submitted that it was important for the scheme

55 See, eg, Submission DP10 (Ai Group).

56 See, eg, Submission DP1 (ACCS).

57 See, eg, Submission DP2 (Aegis).

58 See, eg, Submissions DP12 (AMWU), DP36 (IWHG Monash), DP59 (WorkSafe agent, name withheld).

59 See, eg, Submissions DP2 (Aegis), DP54 (VTHC), DP58 (Xchanging).

60 Submission DP58 (Xchanging) 9.

61 Submission DP27 (Gallagher Bassett) 7.

and for workers that agents constantly try ‘to disrupt the compensation cycle’.⁶² Aegis suggested that ‘the longer someone is on benefits, the more likely it is that they will develop a sense of entitlement to these benefits, with their focus moving to justifying why they deserve their benefits and away from returning to work’.⁶³ Aegis stated that the longer a person remains on a claim, the more likely it becomes that secondary factors will begin to impact on motivation and capacity.⁶⁴

- 6.51. The Australian Rehabilitation Providers Association submitted that the needs of the cohort of workers with claims exceeding 130 weeks:

are unlikely to be effectively met by a system that has been designed to cater to the overwhelming majority of injured workers with less complex claims. The case management practices that are effective for the majority of injured workers who recover in less than six months are ineffective for the more complex claims that eventually exceed 130 weeks.⁶⁵

- 6.52. The Australian Rehabilitation Providers Association also submitted that by the time claims:

are currently identified as being complex, the defining features of their cases and presentations become significantly entrenched, and largely predictive of their future outcomes. Without appropriate and early targeted intervention, the probability of successful recovery, rehabilitation, and return to work outcomes diminishes significantly’.⁶⁶

- 6.53. It was widely agreed that returning to work was a positive both for the scheme and for an injured worker’s mental health and social outcomes. However, the Australian Psychological Society emphasised that if workers are pressured to return to work before they are physically and/or psychologically able to do so, this will inevitably negatively affect their mental health.⁶⁷ The Police Association of Victoria submitted that circumstances where a worker has to make a decision to return to work when they are not ready to do so provides an additional source of complexity.⁶⁸ The Victorian Ambulance Association indicated that in its

62 Submission DP2 (Aegis) 15.

63 Submission DP2 (Aegis) 25.

64 Submission DP2 (Aegis).

65 Submission DP15 (ARPA) 3.

66 Submission DP15 (ARPA) 3.

67 Submission DP14 (APS).

68 Submission DP48 (TPAV).

Improving the experience of injured workers

experience, a supportive and functional return to work for its members results in less likelihood of a complex claim.⁶⁹

Individual circumstances of the injured worker

6.54. Submissions observed that a range of factors unique to an injured worker are linked to complexity.⁷⁰ Factors raised included:

- age
- socio-economic status/ financial situation
- personal relationships and supports
- family situation including childcare responsibilities
- family violence
- English as a second language
- social supports
- housing security
- drug or alcohol dependency
- lack of treatment continuity
- the worker's experience in the scheme to date.

Complexity of the scheme

6.55. Numerous submissions identified 'the compensation system', and the ability of a claimant to understand their rights and entitlements as contributing to complexity.⁷¹

6.56. Specifically, disputes and legal involvement were identified as factors which are likely to contribute to complexity.⁷²

6.57. The Australian Centre for Justice Innovation, Monash University submitted that:

the engagement of a lawyer by a claimant is commonly seen as a marker of complexity in injury compensation systems. In reality, however, there [are] a range of reasons why an injured worker might engage a lawyer and the pathways to lawyer use are not well understood. An emerging body of research has identified the

69 Submission DP52 (VAU).

70 See, eg, Submissions DP2 (Aegis), DP21 (CAC), DP30 (HACSU), DP43 (RACGP), DP54 (VTHC), DP58 (Xchanging), DP59 (WorkSafe agent, name withheld).

71 See, eg, Submissions DP4 (ANMF), DP8 (ACJI Monash), DP27 (Gallagher Bassett), DP52 (VAU).

72 Submission OP7 (Expert academic and medical professional group).

need for and benefits of high-quality empirical analysis of trends in the use of lawyers in compensation schemes.⁷³

- 6.58. The Victorian Injured Worker Outcomes Study 2018 identified the primary reason injured workers with longer term claims seek legal assistance was to find out about their rights or to find an advocate to help them. The points in the life of a claim where this cohort commonly sought legal advice and help were:
- time of claim lodgement if experiencing difficulty with employers or insurers;
 - close to the 52-week point (when the employer's obligation to re-employ the worker ends); and
 - if income or medical benefits were terminated and disputes were unsatisfactorily resolved through internal reviews by agents or through conciliation.⁷⁴
- 6.59. The Australian Nursing and Midwifery Federation (ANMF) submitted that the lack of legislative requirement to provide injured workers with suitable return to work duties is a cause of complexity. Specifically, ANMF contended that claims which extend up to and beyond 52 weeks 'immediately become complex claims'.⁷⁵
- 6.60. Gallagher Bassett referred to scheme factors such as occupational rehabilitation, independent medical examinations, legislation, mandated processes and perceived red tape as leading workers to have a 'negative attitude' that affected the worker's ability to recover.⁷⁶

Biopsychosocial model and tools in risk identification for complexity

- 6.61. A common theme in submissions and roundtable consultations was that any assessment or definition of complexity needs to use a biopsychosocial model, rather than a purely biomedical model.⁷⁷ The weakness of the biomedical model is 'that it ignores the person who has the illness'.⁷⁸ The difference between the two models is explained in Figure 3.

73 Clare Scollay, Janneke Berecki-Gisolf and Genevieve Grant, 'Trends in Lawyer Use in Road Traffic Injury Compensation Claims' (2020) 15(4) *Plos One*; Clare Scollay, Janneke Berecki-Gisolf and Genevieve Grant, 'Claimant lawyer use in road traffic injury compensation claims' (2020) 43(1) *UNSW Law Journal* 82, as cited in Submission DP8 (ACJI Monash) 6.

74 Kilgour and Kosny (n 52) as cited in Submission DP8 (ACJI Monash).

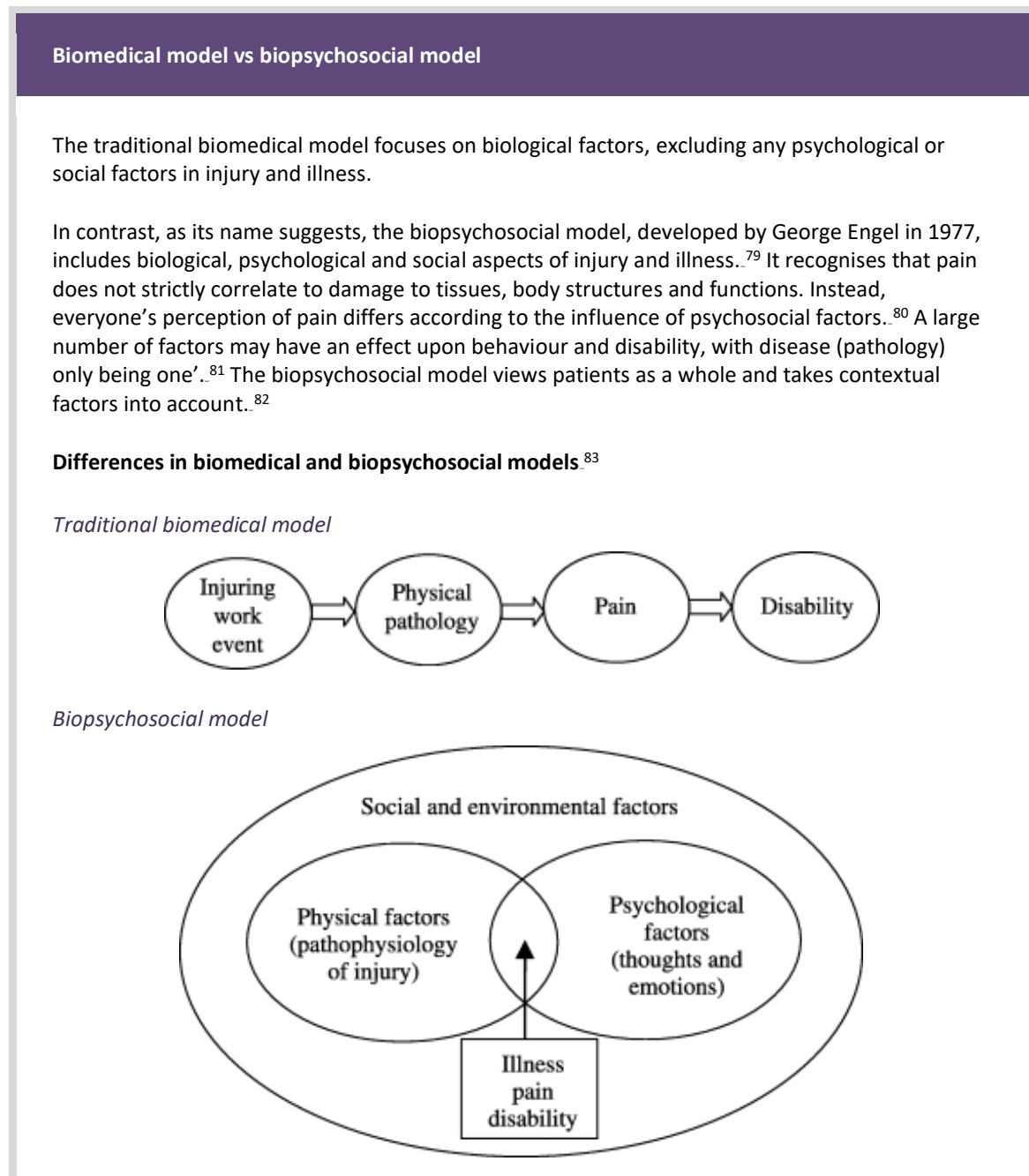
75 Submission DP4 (ANMF) 10.

76 Submission DP27 (Gallagher Bassett) 7.

77 See, eg, Submissions DP25 (Dr. Robyn Horsley), DP24 (Wyatt et al), DP15 (ARPA), DP27 (Gallagher Bassett), DP21 (CAC), DP51 (Uniting Victoria), DP59 (WorkSafe agent, name withheld).

78 Derick Wade, 'Rehabilitation – A New Approach. Part Two: The Underlying Theories' (2015) 29(12) *Clinical Rehabilitation* 1145, 1145.

Figure 3: Biomedical model vs biopsychosocial model



79 George L Engel, 'The Need for a New Medical Model: A Challenge for Biomedicine' (1977) 196 (4286) *Science, New Series* 129.

80 Heads of Workers' Compensation Authorities and Heads of Compulsory Third Party, 'Biopsychosocial Injury Management' (Position paper, June 2011).

81 Debra Duncan and Tanya Covic, 'Compensable work disability management: A literature review of biopsychosocial perspectives' (June 2006) 53(2) *Australian Occupational Therapy Journal* 67.

82 David Rosen, 'George Engel and the origin of the biopsychosocial model' (2020) (Winter) *The Pharos* 18.

83 Diagram adapted from Duncan and Covic (n 81) 68.

The biopsychosocial model is widely used within some areas of clinical practice such as rehabilitation.⁸⁴ The World Health Organization uses a biopsychosocial model in its International Classification of Functioning, Disability and Health.⁸⁵

- 6.62. In a workers' compensation context, the biopsychosocial model captures the importance of the individual circumstances of the worker in assessing complexity.
- 6.63. The WorkSafe Queensland website provides an accessible visual illustration of the biopsychosocial approach that it seeks to use for risk identification and intervention in its workers' compensation scheme:

Figure 4: WorkCover Queensland's biopsychosocial approach.⁸⁶

Biological	Psychological	Social
<ul style="list-style-type: none"> • Physical health • Mental health 	<ul style="list-style-type: none"> • Mood • Personality • Behaviour 	<ul style="list-style-type: none"> • Culture • Family • Socio-economic

- 6.64. Submissions included a variety of definitions for complexity that explicitly referenced psychosocial factors. The definition provided by Dr Robyn Horsley provides a useful summary. Dr Horsley has more than thirty years' experience as a consultant Occupational Physician. She has worked across various iterations of the Victorian workers' compensation scheme and is a member of the WorkCover Advisory Committee.⁸⁷ Dr Horsley submitted that a claim is complex in a biopsychosocial sense if:
 - the worker is vulnerable;
 - the association with the employer is tenuous;
 - relocation or retraining is not straightforward;
 - primary or secondary mental health issues are present; or

84 Wade (n 78) 1145.

85 World Health Organization, 'International Classification of Functioning, Disability and Health (ICF) Framework to Facilitate Interprofessional Education and Collaborative Practice' (Web Page, 13 October 2014) <https://www.who.int/hrh/news/2014/hrh_icf_framework/en/>.

86 WorkSafe Queensland, 'Tailored support - recovery your way' (Web Page) <<https://www.worksafe.qld.gov.au/rehabilitation-and-return-to-work/recovering-from-injury-or-illness/working-together-to-support-recovery/tailored-support-recovery-your-way>>.

87 Submission DP25 (Dr. Robyn Horsley).

- the injury is significant to the worker.⁸⁸
- 6.65. Similarly, the Australian Medical Association, Victoria described a range of psychosocial issues as relevant to the identification of a claim at risk of becoming complex.⁸⁹
- 6.66. Most submissions that did not specify that a biopsychosocial model should be used identified features for assessing complexity that include psychosocial factors. For example, Victorian Trades Hall Council suggested that a complex claim definition should encompass eight areas, which included psychosocial factors.⁹⁰ Most union submissions endorsed this approach or raised very similar factors for consideration.⁹¹ The eight areas identified are:
- the nature of the injury, including the measures and extent of rehabilitation;
 - whether it is a psychiatric injury, or has a psychiatric element to it;
 - whether the injury has led to a secondary injury, including injury to mental health;
 - the circumstances surrounding the time the injury was sustained;
 - the employment of the injured worker, such as the industry in which they are employed, their relationship with their employer, how the employer has handled the injury to date, and their type of employment (i.e. permanent, full-time, part-time, casual or labour hire);
 - the personal circumstances of the injured worker, such as whether they are in secure housing, their financial circumstances, whether they have been subjected to family violence;
 - the treatment of the injured worker by the WorkCover system to date; and
 - the length of time the injured worker has been unable to work.⁹²
- 6.67. The Insurance Work and Health Group, Monash University submitted that:
- recovery from injury and disease is a complex biopsychosocial phenomenon in which various factors across the domains of personal, workplace, health and insurance systems influence both worker outcomes and experiences.⁹³

88 Submission DP25 (Dr. Robyn Horsley).

89 Submission OP3 (AMAV).

90 Submission 54 (VTHC).

91 See, eg, Submissions DP7 (AMIEU), DP12 (AMWU), DP16 (ASU), DP20 (CFMEU), DP30 (HASCU), DP44 (SDA).

92 Submission DP54 (VTHC).

93 Submission DP36 (IWHG Monash) 2.

- 6.68. Psychosocial assessment can be undertaken through a structured interview or via self-report answering a more complete set of questions.⁹⁴ Questions need to be asked across multiple domains, such as beliefs about the condition, coping, distress, and work and perceptions of justice.
- 6.69. A collective submission by a group of researchers and practitioners in workers' compensation stated that injured workers are comfortable completing brief questionnaires, provided their purpose was explained.⁹⁵ In fact, workers appreciate the endeavour to understand their problem.⁹⁶
- 6.70. In 2011 the Heads of Workers' Compensation Authorities published harmonised definitions for biopsychosocial terms and validated biopsychosocial risk assessment tools for consistent application across Australian schemes.⁹⁷
- 6.71. Despite the moves to incorporate a biopsychosocial approach to risk identification into workers' compensation schemes, the Review received numerous submissions suggesting it would be an improvement if psychosocial factors were incorporated in risk identification for complexity. This indicates that the identification of biopsychosocial factors is currently not effectively implemented in Victoria.⁹⁸
- 6.72. Dr Horsley submitted that 'currently, psychosocial risk factors are not systematically identified and addressed in the agent model.'⁹⁹ In simple terms, this means the agent model does not adequately address the psychological and environmental (social and occupational) risk factors.
- 6.73. Similarly, in her thesis, researcher and occupational therapist Dr. Pam Garton, states '... the lack of improvement in work outcomes for injured workers in Australia over recent decades suggests that a comprehensive biopsychosocial approach is rarely applied'.¹⁰⁰

Need for 'human touch' in risk factor identification

- 6.74. A number of submissions identified the need for risk factor identification tools (commonly described as triage tools) and suggested a range of existing tools that

94 Submission DP24 (Wyatt et al).

95 Submission DP24 (Wyatt et al).

96 Submission DP24 (Wyatt et al).

97 Heads of Workers' Compensation Authorities (n 80).

98 Consultation 17 (Expert session 1).

99 Submission DP25 (Dr. Robyn Horsley) 2.

100 Pam Garton, 'Benefits of a Structured Biopsychosocial Approach to Workplace Rehabilitation for Musculoskeletal Injury' (PhD Thesis, La Trobe University, 2019) xi.

might be used or adapted for use in identifying complexity.¹⁰¹ A key point made by numerous submitters across all interest groups was that a ‘human touch’ is needed to assess and manage complexity.¹⁰²

- 6.75. New Zealand's Accident Compensation Corporation (ACC) is responsible for administering the country's no-fault accidental injury compensation scheme. The ACC described their claims segmentation model as underpinned by robust data systems and analytics, together with human contact to enhance actionable insights into client needs.¹⁰³
- 6.76. Similarly, the workers' compensation authority for British Columbia in Canada, WorkSafeBC, stated that it uses a rules-based system which automates claim segmentation and predicts claims management needs. WorkSafe BC's aim is to be able to identify what questions and data assists prediction the most.¹⁰⁴
- 6.77. Eleven years ago, WorkSafeBC implemented a claims management system which was designed to take humans out of the front end of claims. They have spent a long time trying to wind back that position.¹⁰⁵
- 6.78. WorkSafeBC said they 'can't overstate the value of having people involved early'.¹⁰⁶ Recognising that not all workers need human involvement, WorkSafeBC is still trying to increase automation for certain claims, in a targeted way.
- 6.79. Some agents described the triage methods they use, which combine automated processes with human decision-making. For example, one agent described its ‘enhanced triage’ as follows:

Complexity is determined by variety of factors (data & information gathered from stakeholders); WorkSafe’s triage tool leverages technology to assess initial risk of complexity; Injury Management Advisors & specialised Medical Practitioners recommend the most appropriate path for an injured worker early in the claim

101 See, eg, Submissions DP1 (ACCS), DP3 (Alan Clayton), DP10 (Ai Group), DP15 (ARPA), DP16 (ASU), DP21 (CAC), DP24 (Dr. Mary Wyatt et al), DP27 (Gallagher Bassett), DP42 (Occupational rehabilitation provider, name withheld), DP43 (RACGP), DP45 (Slater and Gordon Lawyers), DP46 (Suncorp), DP52 (VAU), DP53 (VFF), DP55 (WorkSafe agent, name withheld), DP57 (WorkSafe), DP58 (Xchanging), DP59 (WorkSafe agent, name withheld).

102 See, eg, Submissions DP1 (ACCS), DP2 (Aegis), DP15 (ARPA), DP21 (CAC), DP24 (Wyatt et al), DP25 (Dr. Robyn Horsley), DP27 (Gallagher Bassett), DP41 (MBV), DP42 (Occupational rehabilitation provider, name withheld), DP43 (RACGP), DP46 (Suncorp), DP48 (TPAV), DP59 (WorkSafe agent, name withheld).

103 Consultation 25 (ACC NZ).

104 Consultation 24 (WorkSafeBC).

105 Consultation 24 (WorkSafeBC).

106 Consultation 24 (WorkSafeBC).

Improving the experience of injured workers

lifecycle; Early intervention helps give complex cases targeted support as soon as possible..¹⁰⁷

6.80. Some triage tools rely heavily on data to assess risk factors for claims becoming complex. Submissions frequently stated that this data approach is valuable but is more effective where supplemented by a human assessment..¹⁰⁸

6.81. Australian Industry Group submitted that:

[a]rtificial intelligence systems should not be the only source of such an assessment, but they can identify those claims that have critical characteristics that may lead to complexity, to enable rapid assessment of the need for intervention'..¹⁰⁹

6.82. The Australian Lawyers Alliance agreed with both the need for triage tools, and the need for humans to drive the process. It submitted that:

this cannot be all algorithm driven. For a system to have, at its heart, the best interests of the injured worker front and centre, we need to steer away from 'tick box' related processes. The experience of those charged with making such decisions is very important..¹¹⁰

6.83. The Australian Rehabilitation Providers Association also supported evidence-based triaging which involves human assessment to establish case complexity. It suggested that:

case complexity should be measured using a combination of recognised biopsychosocial triage tools, software algorithms and an in-person assessment from a human who is a qualified and recognised health professional with appropriate education, training and experience..¹¹¹

6.84. The use of automation and data analytics offer opportunities for triage models to predict outcomes of injured workers' claims with greater accuracy. However, the experience of other schemes, most recently the workers' compensation system in New South Wales (icare), serve as a lesson that too much reliance on systems can result in poor outcomes for injured workers, and ultimately, the scheme.

6.85. The following case study provides a summary of icare's experience with a data driven triage model.

107 Submission DP59 (WorkSafe agent, name withheld) 19.

108 See, eg, Submissions DP47 (Technology provider, name withheld), OP4 (ARPA).

109 Submission DP10 (Ai Group) 7.

110 Submission OP2 (ALA) 9.

111 Submission OP4 (ARPA) 2.

Considerations for future triage models: The icare experience¹¹²

Overview

At the start of 2018, icare, the Nominal Insurer of the New South Wales workers' compensation scheme, introduced a new claims operating model. This resulted in adverse outcomes for injured workers as well as deteriorating return to work rates and excessive claim payments.¹¹³

Workers were automatically streamed into five segments based on basic claim information. Workers expected to require more than two weeks off work and more proactive and specialised support, coupled with low levels of automatic decision-making, were streamed into the three 'high risk' segments. Workers needing lower levels of support received automatic treatment approval, straight-through processing of payments and automated standard letters.

The Issues

In 2019, Ms Janet Dore, supported by the consulting firm EY, reviewed icare. Ms Dore's report describes issues with overreliance on a data driven model:

The new system is highly dependent on an algorithm which determines claim severity and therefore treatment. Such an automated process will miss the subtleties of individual circumstances, for which case management skills are needed.¹¹⁴

EY identified the following factors which affected outcomes for injured workers:

- Approximately 40% of the files reviewed were allocated to the wrong support category delaying the necessary treatment the injured workers required.
- The triage algorithm incorrectly assigned injured workers to cohorts where the support levels were inadequate. It took too long to rectify this and to subsequently provide the appropriate case management.
- Workers whose claims were allocated to two of the model's five segments were not assigned a dedicated case manager which resulted in passive claims management and a lack of timely intervention.
- icare encouraged the model's single agent to focus on recruiting staff with customer services capability. This appears to have resulted in a lack of focus on recruiting the skills and experience required for the case management of workers' compensation claims.
- The claims operating model lacked an effective governance structure.¹¹⁵

112 EY, *Compliance and Performance Review of the Nominal Insurer* (Report, December 2019).

113 EY (n 112).

114 Janet Dore, *Independent Reviewer Report on the Nominal Insurer of the NSW Workers Compensation Scheme* (Report, December 2019) 64.

115 EY (n 112) 4-7.

When to identify complex claims

Early identification and review to enable timely and targeted intervention is critical

- 6.86. Numerous consultations and submissions highlighted that outcomes for the injured worker are improved if claim complexity is identified early and managed proactively. This should include targeted treatment and support.¹¹⁶ There were a variety of views on the best time to identify claims at risk of complexity to enable appropriate intervention and support.
- 6.87. A number of submissions suggested that the use of triage tools initially at claim lodgement or acceptance and at regular review points would assist in identifying the complex claims cohort as early as possible.¹¹⁷
- 6.88. Some submissions considered that complexity can be identified from the outset.¹¹⁸ For example, Dr Robin Horsley submitted that '[u]sing the biopsychosocial definition, a case can be considered complex from day one, post injury'.¹¹⁹
- 6.89. Submissions stated that in some cases it will be clear that the claim is complex from the beginning; for example, if the injury is severe or there are multiple injuries.¹²⁰
- 6.90. The Insurance Work and Health Group, Monash University explained that its research demonstrates 'that the information needed to identify complexity can be collected within two weeks of a claim being accepted in NSW and within four weeks in Queensland'.¹²¹
- 6.91. A Canadian workers' compensation scheme, WorkSafeBC, said that its model initially segments claims based on injury type.¹²² WorkSafeBC does not have a good prediction of complexity until day 60. Claims are escalated to a case

116 See, eg, Submissions DP1 (ACCS), DP6 (RACP), DP7 (AMIEU), DP11 (ALA), DP15 (ARPA), DP16 (ASU), DP21 (CAC), DP24 (Dr. Mary Wyatt et al), DP25 (Dr. Robin Horsley), DP36 (IWHG Monash), DP39 (LIV), DP41 (MBV), DP43 (RACGP), DP45 (Slater and Gordon Lawyers), DP48 (TPAV), DP49 (UFU), DP51 (Uniting Victoria), DP55 (WorkSafe agent, name withheld), DP59 (WorkSafe agent, name withheld).

117 See, eg, Submissions DP15 (ARPA), DP36 (IWHG), OP8 (Gallagher Bassett)

118 See, eg, Submissions DP2 (Aegis), DP10 (Ai Group), DP8 (ACJI Monash), DP7 (AMIEU), DP11 (ALA), DP14 (APS), DP12 (AMWU), DP55 (WorkSafe agent, name withheld), DP27 (Gallagher Bassett), DP39 (LIV), DP42 (Occupational rehabilitation provider, name withheld), DP45 (Slater and Gordon Lawyers), DP46 (Suncorp), DP48 (TPAV), DP52 (VAU), DP54 (VTHC), DP58 (Xchanging).

119 Submission DP25 (Dr. Robyn Horsley) 2.

120 See, eg, Submissions DP2 (Aegis), DP7 (AMIEU), DP8 (ACJI Monash), DP11 (ALA), DP12 (AMWU), DP14 (APS), DP36 (IWHG Monash), DP39 (LIV).

121 Submission DP36 (IWHG Monash) 4.

122 Noting that some claims require more information before they can be segmented.

manager if the worker receives 12 weeks of benefits.¹²³ Rather than being time-based, segmentation reviews are rules driven and still largely driven by injury type although WorkSafeBC are working to improve this.¹²⁴

6.92. The Department of Labor and Industries, which manages the State of Washington's workers' compensation system in the USA, suggested that an absence from work of about 30 days is the right time for bringing in vocational professionals. The Department of Labor and Industries noted that it can be problematic to focus solely on the duration of absence from work as there can be a gap between the injury and claim lodgement. Work is underway in the State of Washington to bring vocational interventions closer to the date of injury.¹²⁵

6.93. There were suggestions in submissions and roundtable discussions that there should be an initial assessment when the claim is lodged and then 'rule of thumb' point in time triggers for review. Suggestions included:

- four weeks off work;¹²⁶
- 13 weeks;¹²⁷
- six weeks, 13 weeks, 26 weeks, 52 weeks and 130 weeks from lodgement of the claim;¹²⁸
- between 52 and 130 weeks;¹²⁹
- no later than 70 days;¹³⁰
- time based, such as monthly, and/or triggered by key claim events;¹³¹
- if a worker is not working at either 78 or 104 weeks.¹³²

6.94. A variety of timeframes were suggested for review of complexity. The Australian Centre for Justice Innovation, Monash University, suggested the following timelines:

- at the time of the injury;

123 Consultation 24 (WorkSafeBC).

124 Consultation 24 (WorkSafeBC).

125 Consultation 23 (Dept L&I, Washington).

126 Submission DP10 (Ai Group) 7.

127 See, eg, Submissions DP4 (ANMF), DP42 (Occupational rehabilitation provider, name withheld), DP48 (TPAV).

128 Submission DP16 (ASU) 2.

129 Submission DP11 (ALA) 8.

130 Submission DP15 (ARPA) 2.

131 Submission DP55 (WorkSafe agent, name withheld).

132 Submission DP45 (Slater and Gordon Lawyers).

- **at claim lodgement**—suggesting that complexity increases if the claim is pending or investigated, if the employer disputes the claim, and/or lawyer is engaged;
 - **when treatment commences, and when ongoing treatment is requested**—suggesting that healthcare practitioners should screen biopsychosocial factors which help identify barriers to recovery; and
 - **at regular intervals throughout the life of the claim**—suggesting that case management meetings with the injured worker and all treating practitioners should review and refine coordinated rehabilitation and return to work.¹³³
- 6.95. The Australian Rehabilitation Providers Association submitted that review points should occur no later than day 70 as by this point, there is only a 30% chance that the injured worker will return to work.¹³⁴

Better practice for the identification of complex claims – the research

- 6.96. There is a significant body of evidence on factors which may have a role in the prediction of claim complexity in a workers' compensation scheme.¹³⁵
- 6.97. As most schemes target factors which predict the duration of a worker's time off work, most scheme research has focused on this too.¹³⁶
- 6.98. As discussed at 6.61 there is now broad agreement and an extensive body of research to support the view that effective injury management needs to be based on a biopsychosocial approach. Such an approach considers the whole person, their physical, social, psychosocial and emotional needs.¹³⁷
- 6.99. Biopsychosocial principles can assist with the identification of features which may lead to a worker having a claim with complex characteristics.¹³⁸ For example, an

133 Submission DP8 (ACII Monash).

134 Submission DP15 (ARPA) 2.

135 See, eg, Ross Iles et al, Institute for Safety, Compensation and Recovery Research, *Identifying Client Needs - Worldwide Evidence Review* (Evidence review, March 2017) ('Evidence review'); Iles et al, (n 1); Kilgour and Kosny, 'Victorian Injured Worker Outcomes Study' (n 52); Nina Ellis and David Gifford, 'The TAC's Longitudinal Client Outcomes Study' (Conference Paper, Actuaries Institute: Injury Schemes Seminar, 8 – 10 November 2015); Submission DP24 (Wyatt et al).

136 Iles et al, Evidence review (n 135); Iles et al (n 1); Kilgour and Kosny, Victorian Injured Worker Outcomes Study (n 52); Ellis and Gifford (n 135); Dorothy Frost and Dianne Sheppard, *Discussion Paper: The Impact of Compensation on Recovery - Why do People with Compensable Injuries Report Worse Functional Outcomes?* (Discussion Paper, IPAR, 2017).

137 Heads of Workers' Compensation Authorities (n 80); World Health Organization, 'Towards a common language for functioning, disability, and health: ICF' (Report, 2002) as cited in Submission DP24 (Wyatt et al).

138 Submission DP24 (Wyatt et al).

- understanding of a person's recovery expectations and attitudes to return to work can provide valuable insights on the potential complexities in a worker's claim from a very early stage.¹³⁹
- 6.100. Collection of information to assist with the identification of complex claims is not an end in itself—it is only of value if it is linked to the delivery of effective rehabilitation and work-focused interventions.¹⁴⁰
- 6.101. As discussed in Chapter 7, to achieve the best recovery and return to work outcomes, the early identification of risk factors needs to be coupled with interventions tailored to those risk factors. There are many triage tools designed to identify workers with complex needs. These include questionnaires and conversational approaches.
- 6.102. A report prepared for the TAC in 2017 summarised the characteristics of validated information gathering tools used to identify and respond to clients' needs.¹⁴¹
- 6.103. Of the 8,000 studies available, the report's authors only identified two that allowed evaluation of the effectiveness of providing the most appropriate care at the best possible time (targeted care).¹⁴²
- 6.104. While the tools examined in the report provided a wide range of options for identifying client needs, '...no single factor emerged to guide the selection of the most appropriate tool... a pragmatic approach should be taken ... with implementation factors guiding the decision on which tool to use'.¹⁴³
- 6.105. By targeting factors that predict how long a worker will be off work, scheme managers can identify the small proportion of claims where the injured worker experiences poor outcomes, while the scheme outlays significant resources.
- 6.106. In its submission, the Insurance Work and Health Group, Monash University described the Sherbrooke Model of Work Disability, a biopsychosocial model specifically developed for the field of return to work and workers' compensation. The model groups individual predictors of return to work into four domains, which reflect the key participants in Australian workers' compensation schemes:

139 Iles et al (n 1).

140 G. Waddell, K. Burton and C. Main, 'Identifying People at Risk of Long-term Incapacity for Work' (Royal Society of Medicine Press Ltd, London UK, 2003) as cited in Pam Garton, Gregory Murphy and Paul O'Halloran, 'A Practical Tool to Improve Outcomes in Work Injury Management' (2015) 53(4) *Work* 927.

141 Iles et al, Evidence review (n 135).

142 Iles et al, Evidence review (n 135).

143 Iles et al, Evidence review (n 135) 6.

Improving the experience of injured workers

- Personal domain (the claimant/worker)
- Workplace domain (the employer)
- Health care domain (the health care provider)
- Legislative and insurance domain (agents, insurers and regulators).¹⁴⁴

6.107. A recent literature review by the Insurance Work and Health Group, Monash University identified 33 factors with moderate to strong evidence of an impact on return to work outcomes. The factors were distributed across all four domains of the Sherbrooke Model of Work Disability and the review rated the factors according to whether they are modifiable or not modifiable.¹⁴⁵

6.108. Based on its research, the Insurance Work and Health Group, Monash University concluded that 'major opportunities to improve return to work, and thus reduce the risk of a worker's claim becoming complex, include addressing modifiable factors in the compensation/insurance domain (claims management practices) and the workplace domain'.¹⁴⁶ Not all factors associated with complexity can be changed. For example, the severity of the injury is associated with complexity but cannot be changed. Interventions should target factors that can be changed.

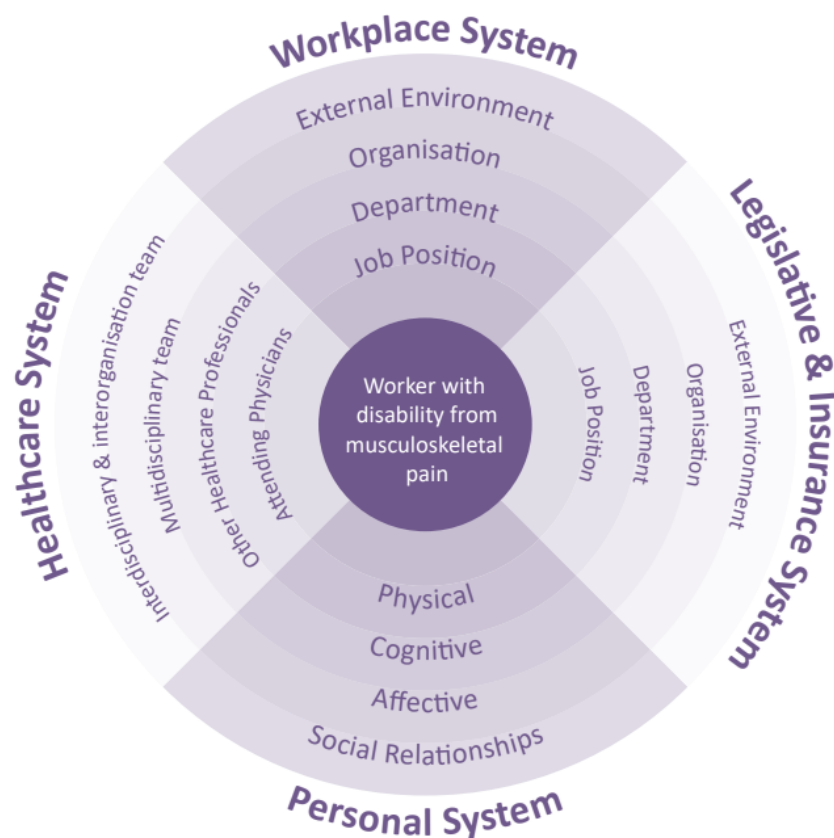
6.109. The Sherbrooke Model of Work Disability prevention is illustrated in Figure 5.

¹⁴⁴ Submission DP36 (IWHG Monash).

¹⁴⁵ Submission DP36 (IWHG Monash).

¹⁴⁶ Submission DP36 (IWHG Monash) 3.

Figure 5: Sherbrooke model of work disability prevention.¹⁴⁷



Timing for determination of complexity—striking a balance

6.110. Research has consistently found that risk factor identification should occur periodically throughout the course of a worker's claim not just at the outset.¹⁴⁸

This is consistent with views expressed in consultations and submissions.¹⁴⁹

6.111. The objective of identifying factors which may have a role in complexity is to inform effective early intervention. As the claim progresses, the ability to positively influence outcomes decreases.¹⁵⁰ The longer a worker is absent from work, the less likely it is that they will have a sustainable return to work.¹⁵¹ From

147 Loisel et al., 2005 as cited in Frost and Sheppard (n 136).

148 See, eg, Iles et al (n 1).

149 See, eg, Submissions DP8 (ACJI Monash), DP36 (IWHG Monash).

150 Iles et al (n 1).

151 Submission DP24 (Wyatt et al).

this perspective, determination of complexity should be assessed as early as possible.

- 6.112. However, as a claim progresses, more information becomes available or able to be obtained. This means that factors leading to complexity are more easily identified and the prediction of claim outcomes is more accurate. The two large increases in the amount of information that can be collected occur when the claim is first made and when initial contacts are made with the injured worker, the employer and the worker's treating practitioner(s).
- 6.113. In determining the appropriate time or times to assess the factors leading to complexity of a worker's claim, the availability of information and the timeframe for effective intervention must be balanced with the ability to predict likely outcomes..¹⁵²
- 6.114. The Insurance Work and Health Group, Monash University (IWHG Monash) prepared a Best Practice Statement as part of the Recovery Blueprint Project, a partnership between WorkCover Queensland and IWHG Monash..¹⁵³ The box below describes the Best Practice Statement, including the optimal timing for risk factor identification and interventions.

Timing for risk identification; striking a balance—The Recovery Blueprint Project

The Best Practice Statement describes the optimal time for a range of interventions as 'an identified therapeutic window of six to twelve weeks post injury'..¹⁵⁴ This suggests that the information required to inform proactive service delivery should be collected, interpreted, and linked to action by six weeks post injury. This time frame strikes a balance between intervening where it is not required and acting early enough to potentially avoid chronic complications..¹⁵⁵

This time frame considers 'the timing of information availability, predictability of claim outcomes, the ability to intervene in order to positively influence outcomes and the resources required to collect the information required to inform appropriate action'..¹⁵⁶

The Best Practice Statement identifies four domains of risk factors for delayed return to work:

- injury;
- work;

152 Iles et al (n 1).

153 Iles et al (n 1).

154 Iles et al (n 1) 21.

155 Iles et al (n 1).

156 Iles et al (n 1) 28.

- individual; and
- scheme specific elements.¹⁵⁷

The Best Practice Statement identifies two key opportunities for risk factor identification to guide management of a case and monitoring of progress:¹⁵⁸

- *During liability determination* - To identify the most appropriate method of management to be applied to the claim (e.g. allocation of cases which require low, medium and high levels of support); and
- *During early case management* - This is to ensure that the most appropriate services are delivered during the period where they are likely to have the greatest positive influence on outcomes.

'Best Practice Principles' for delayed return to work risk identification:¹⁵⁹

- Assess risk factors across multiple domains (injury, work, individual and scheme specific elements).
- Balance timing for effective information capture and positive intervention with resources required (automated information capture is less resource intensive though also less sensitive, and the ability to positively intervene declines over time).
- Use both administrative and more comprehensive risk factor information.
- Information and data systems must deliver effective information that points to timely, relevant action (in the therapeutic window 6 -12 weeks post injury).
- Systematically document and monitor risk factors and changes over time.
- Combine appropriate automation and judgement-based decision making, dictated by the information available and purpose of the decision.
- Contextual factors determine the most effective use of risk information.

6.115. A Risk Factor Identification Guide was prepared as part of the Best Practice Statement.¹⁶⁰ It aims to describe the context-specific factors that should guide decisions around intervention.¹⁶¹ WorkCover Queensland used the Risk Factor Identification Guide to assess its current practices and assist in the design of the future approach to claims management, through risk factor identification and intervention.

6.116. After a successful pilot, WorkCover Queensland introduced a new approach to the identification of risk factors which may lead to complexity. In conjunction

157 Iles et al (n 1).

158 Iles et al (n 1).

159 Iles et al (n 1).

160 Iles et al (n 1) 6.

161 WorkCover Queensland, 'Case Study Recovery Blueprint Project' (Presentation, National Workers Compensation Summit, February 2020).

with this approach, once an injured worker's claim is accepted, they are immediately allocated a case manager if they are not back at work.¹⁶²

- 6.117. Information about risk factors is gathered using evidence-based tools, such as questionnaires. The case manager introduces the questionnaire to the injured worker, and engages with workers, employers and treating providers to help plan rehabilitation and return to work.¹⁶³ Cases are then triaged into care profiles, providing a basis for case management processes. This is discussed in Chapter 7.

Better practice approach to the identification of complex claims in other schemes

- 6.118. I consider that, in addition to the Queensland model, the approaches of the Accident Compensation Corporation in New Zealand, and that of the TAC provide examples of better practice for identifying client needs and risk of complexity. This risk identification is used to match the needs of clients with appropriate and timely interventions. Both models are described in more detail below.

Better practice triage — The TAC model

- 6.119. TAC introduced a needs-based/complexity-based segmentation model in 2018. This followed research indicating that the existing triage model was not appropriately supporting the needs of TAC clients.¹⁶⁴
- 6.120. This model uses an algorithm with the following complexity factors to segment claims:
- Persistent pain
 - Mental health
 - Accident response
 - Recovery expectations
 - Service environment (risk of poor knowledge of or access to service)
 - Physical health.¹⁶⁵

162 Consultation 16 (OIR and WorkCover Queensland).

163 Consultation 16 (OIR and WorkCover Queensland).

164 Consultation 38 (TAC session 2).

165 Consultation 38 (TAC session 2).

Improving the experience of injured workers

- 6.121. Segmentation occurs within the first 21 days of claim lodgement. TAC found that if screening occurs too early there are false positives. TAC indicated that it is aiming for a more dynamic model of assessing complexity in the future.¹⁶⁶
- 6.122. Screening is outsourced and is conducted through a telephone interview using the EQ-5D health questionnaire tool, which measures health-related quality of life.
- 6.123. Once a client is screened and TAC receives the survey report, they are then triaged based on the complexity factors described above at 6.120. If a client has four or more complexities, a more active management approach is taken. If there are fewer than four factors of complexity, a 'light-touch' management approach is taken.¹⁶⁷
- 6.124. From here, claims are segmented into three pathways:

Table 1: TAC support categories

Rapid recovery	Supported recovery	Independence
TAC supports these clients to get their lives back on track as quickly as possible (short-term services). This segment is designed to enable clients to obtain the support they need and then get out of the system as quickly as possible.	This segment provides intense support for clients with complex needs such as mental injury and persistent pain. A red flag for complexity might be a person saying 'I don't think I will ever get back to work', within the first 21 days. TAC develops a plan for the client addressing outcomes the client is trying to achieve. The plan considers factors such as the client's work and home situations and social interactions.	This segment is for clients who will have a lifelong injury/disability and relationship with TAC, such as serious spinal injuries.

Better practice triage—the New Zealand Accident Compensation Corporation (ACC) model

- 6.125. The ACC introduced a new approach to claims management 'Next Generation Claims Management' model (NGCM) in late 2019 after earlier, smaller scale trials. Implementation of NGCM across the ACC was completed in September 2020.¹⁶⁸

166 Consultation 38 (TAC session 2).

167 Consultation 38 (TAC session 2).

168 Email from [REDACTED], ACC to Independent Agent Review, 2 December 2020.

Improving the experience of injured workers

6.126. The ACC describes the NGCM as taking a holistic approach to managing clients according to their needs, rather than their type of injury.¹⁶⁹ The ACC told the Review:

The model looks at a client’s specific needs, and ensures they have the best and most appropriate support they need, which changes as those needs change. Simplified, efficient and automated processes enable ACC staff to spend more time on high quality conversations and decision-making with customers, and less time on administrative tasks. Greater use of digital services and a self-service approach also gives clients greater control over their own recovery by allowing them to decide what, when and how they want to engage.¹⁷⁰

6.127. The ACC uses an automated triage system that applies rules and algorithms to the data received to decide whether to accept the claim. The claim is then initially assigned to a level of support. After this initial automated triage, a layer of human judgment is applied to decide if the client is receiving the correct level of support. This is based on data as well as conversations with the client, employer, and providers.¹⁷¹ There is not a set profile for clients allocated to the levels of support under the NGCM.

6.128. Claims under the NGCM fall into the following five support categories:

Table 2 – NGCM support categories

Enabled Recovery	Assisted Recovery	Supported Recovery	Partnered Recovery	Provider Recovery
Clients will primarily manage their own recovery using online tools	Clients manage their own recovery with an ACC team member in contact if there is something to discuss	A dedicated ACC staff member is assigned to the client for the recovery process	Clients build a relationship with an assigned ACC staff member who supports them in the recovery process.	Providers will provide support to clients to manage their recovery.

6.129. The case management stream under the NGCM that best aligns with complex claims being considered by this Review, is ‘partnered recovery’.

¹⁶⁹ Accident Compensation Corporation, 'Next Generation Case Management: ACC's Client Transformation' (Presentation, March 2018).

¹⁷⁰ Email from ██████████, 2 December 2020 (n 168).

¹⁷¹ Consultation 25 (ACC NZ).

- 6.130. Under the NGCM model, a client may transition to a different level of support and a different team. A transition might occur if there is a change in the client's situation which warrants a change in the type of support provided.¹⁷²
- 6.131. The ACC has transition guidelines and staff receive induction training about when to transition a client. The primary transition check is completed by the team that receives a client's claim. If a member of a receiving team feels the transition is inappropriate, their team leader will speak with the team leader of the person who transitioned the claim.¹⁷³
- 6.132. Factors that are considered in deciding if a transition should occur include:
- **Whether the client requires a 1-on-1** relationship with ACC or whether they are suited to the many-to-many approach of the Assisted Recovery team;
 - **The number of stakeholders involved in the client's recovery**, and the complexity of managing these relationships;
 - **The client's personal circumstances**, including whether they are in a vulnerable position, have complicated co-morbidities, or other complexities that may require increased support;
 - **How the client's recovery is progressing** against expected recovery profiles;
 - **The client's employment status** and the implications on their recovery pathway;
 - **In some cases, the complexity, severity or sensitivity of the client's injury**, and the level of supports required as a result;
 - **In some cases, the age of the client**, and needs directly relating to their age/injury;
 - **In some cases, the type of programmes required to support the client**, such as vocational independence assessments or housing modifications;
 - **The stability of the client's injury and recovery**, and the direct impact this stability has on their need for regular involvement from ACC or other stakeholders.¹⁷⁴
- 6.133. A New Zealand 2020 Controller and Auditor-General report states:
- Although ACC has been implementing the NGCM approach since 2017, it has not fully embedded the approach yet. ACC's early evaluation indicates that claimant

172 Email from [REDACTED], [REDACTED], ACC to Independent Agent Review, 5 March 2021.

173 Email from [REDACTED], 5 March 2021 (n 172).

174 Email from [REDACTED], 2 December 2020 (n 168).

experience and recovery outcomes are improving. However, it is too early yet to assess whether NGCM's benefits will be fully realised.¹⁷⁵

Current approach to identifying complex claims in Victoria

- 6.134. WorkSafe's current approach to identifying workers with complex claims for weekly payments targets factors which predict the probability of a worker returning to work within 26 weeks from claim lodgement.¹⁷⁶
- 6.135. That is, the scheme's assessment of an injured worker's need for care, and the corresponding allocation of resources to that person, is made with reference to the duration of time a worker is likely to be unable to work.
- 6.136. Targeting factors which predict a delayed return to work is a common approach in Australian workers' compensation schemes, although schemes differ in the duration of time off work the factors are predicting. For example,
- icare's triage approach targets factors which predict 6 weeks' time lost or more;¹⁷⁷
 - WorkCover Queensland's Recovery Blueprint triage approach targets factors predictive of 'delayed return to work';¹⁷⁸
 - ReturnToWorkSA's triage approach targets factors which predict one or more years' time lost.¹⁷⁹

Triage

- 6.137. WorkSafe first defined a more consistent claims model across agents in 2002.¹⁸⁰ The current model divides claims management into risk segments which are based on the length of time the worker has been receiving weekly payments.

175 Controller and Auditor-General, *Accident Compensation Corporation Case Management: Progress on Recommendations Made in 2014* (Report, November 2020) 14.

176 WorkSafe Victoria, 'Quantium Detail Pack' (Presentation, undated), by email from [REDACTED] (WorkSafe) to Kirsten McKillop, Director Independent Agent Review, 3 December 2020.

177 icare, 'The 'human' side of claims triage' (Web Page, 26 March 2018) <<https://www.icare.nsw.gov.au/news-and-stories/the-human-side-of-claims-triage/#gref>>.

178 WorkSafe QLD, 'Recovery Blueprint' (Web Page, 1 December 2020) <<https://www.worksafe.qld.gov.au/about/who-we-are/workcover-queensland/workcover-queensland-research-initiatives/recovery-blueprint>>.

179 Return to Work SA and Analytikk Consulting, 'Analytics-assisted triage of workers' compensation claims' (Conference presentation, Actuaries Institute Injury Schemes Seminar: Road to Recovery, November 2015) <<https://www.actuaries.asn.au/Library/Events/ACS/2015/8d.Lebedev.pdf>>.

180 WorkSafe, *Agency Model Review* (Report, 2013) ('WorkSafe 2013').

Improving the experience of injured workers

- 6.138. Workers are moved to a segment and a different case manager based on the length of time they have received weekly benefits. The model varies somewhat between agents.
- 6.139. WorkSafe's model has four risk segments:
- Low-risk (largely claims that are medical only expenses)
 - High-risk (time lost from work) 0-78 weeks
 - High-risk (time lost from work) 78-130 weeks
 - High-risk (time lost from work) 130+ weeks
- 6.140. When a claim is lodged, the agent decides whether to accept the claim. If the claim is accepted, it will be triaged either to the 'low risk' category or the 'high risk (0-78 weeks)' category.
- 6.141. Generally, claims triaged as 'low risk' are those where it does not appear to the agent that the worker involved is at risk of a delayed return to work.
- 6.142. Claims may move back and forth between 'low risk' and 'high risk' claims management if the circumstances of the individual worker change. For example, a worker who is only receiving compensation in the form of medical expenses might be in the 'low risk' claims management area; however, if the worker then needs to stop working to have surgery, they might move to 'high risk' until they return to work.
- 6.143. WorkSafe's claims manual describes the main objective of each 'high risk' segment as follows in table 3:¹⁸¹

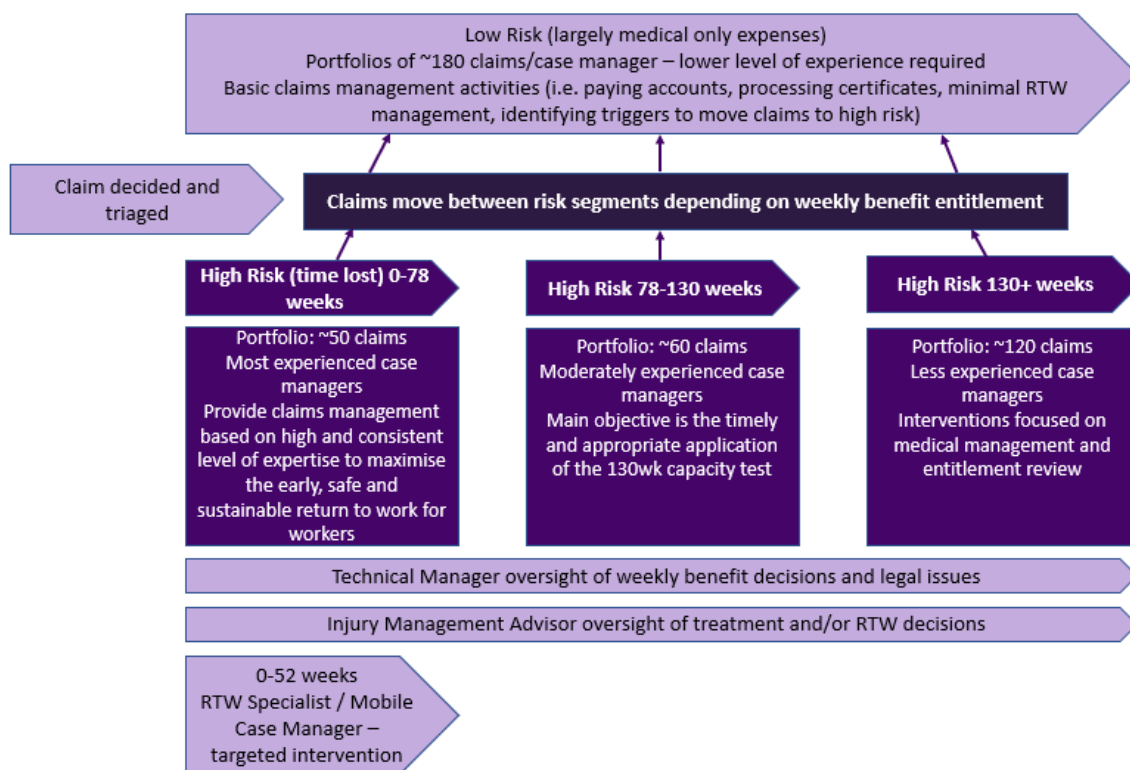
Table 3: Objectives of high-risk segments

0 - 78 weeks	78 - 130 weeks	130 weeks +
'To ensure that claims management is based on a high and consistent level of medical, legal and case management expertise to maximise the early, safe and sustainable return to work of workers.'	'In addition to the aim of the 0-78 weeks segment, the main objective of the Tail segment is the timely and appropriate application of the Capacity Test at the end of the second entitlement period.' (130 weeks)	'To regularly review a claim to ensure that the worker receives their correct entitlement to weekly payments after the second entitlement period.'

¹⁸¹ WorkSafe Victoria, 'Claims Manual' (Web Page, 2020) pt 2.6.3 <www1.worksafe.vic.gov.au/vwa/claimsmanual/Home.htm> ('WorkSafe Claims Manual').

6.144. Claims may shift between the risk segments as illustrated in Figure 6.

Figure 6—Segmented claims management.¹⁸²



6.145. As WorkSafe has conducted limited testing on the triage model, there is limited understanding as to the model's accuracy or effectiveness.¹⁸³ Analysis of the model undertaken for WorkSafe by the consultant Quantum from December 2018 to March 2019, identified a poor adoption of psychosocial data collection by agents.¹⁸⁴ An important feature of the model is its reliance on the re-triaging of claims as new data becomes available.¹⁸⁵

6.146. Despite WorkSafe not having performed a comprehensive evaluation of its triage model or perhaps in acknowledgement that there is significant scope for improvement in the identification of complex claims, WorkSafe is currently trialling some new triaging models discussed from 6.155 below.

¹⁸² Figure 6 is derived from WorkSafe Claims Manual (n 181) pt 2.6. Boston Consulting Group, 'Agent Model Review: Phase II Playbook' (Presentation to WorkSafe Victoria, March 2009) 28-29.

¹⁸³ WorkSafe Victoria, 'Quantum Detail Pack' (n 176).

¹⁸⁴ WorkSafe Victoria, 'Quantum Detail Pack' (n 176).

¹⁸⁵ WorkSafe Victoria, 'Quantum Detail Pack' (n 176).

6.147. WorkSafe has initiated numerous programs recognising the role of biopsychosocial factors in claims management. Its Clinical Framework for the Delivery of Health Services, first established in 2009, is based on biopsychosocial principles. WorkSafe currently collects information from injured workers which includes biopsychosocial factors. However, WorkSafe's approach to identifying workers with complex needs does not fully embrace a biopsychosocial model.

Agents' approach to identifying and triaging complex claims

6.148. While WorkSafe broadly sets out how agents should determine which workers are more likely to have complex needs, each agent differs slightly in its application of the framework.

6.149. Agents' submissions described their various approaches to assessing claims for complexity. Gallagher Bassett uses a risk score. The risk score is generated by its own risk assessment tool, information obtained from relevant stakeholders, documentation such as medical reports and scans and direct and indirect information based on conversations with the injured worker. Gallagher Bassett's risk assessment tool allocates a risk score on a scale of 0 to 0.9 based on the injured worker's likelihood of returning to work within 26 weeks. The risk is greatest at 0.9.¹⁸⁶

6.150. Gallagher Bassett provided an example using data from 1 January–30 June 2020 to illustrate the difficulty in determining complex claims. Of the registered claims received by Gallagher Bassett during this time:

- 175 claims were identified as complex based on claim data (that is, had a risk score of 0.8 or 0.9) however 93 (53%) of these claims returned to work in less than six months; in contrast to
- 243 claims that were determined to be simple, non-complex claims (that is, had a risk score of 0 to 0.3) where 28 of these injured workers (11.5%) had not returned to work after six months.¹⁸⁷

6.151. Based on this data, Gallagher Bassett expressed the view that:

- Complexity cannot be solely determined using data;
- Proactive case management can provide improved outcomes on complex claims; and

¹⁸⁶ Submission DP27 (Gallagher Bassett).

¹⁸⁷ Submission DP27 (Gallagher Bassett) 9.

Improving the experience of injured workers

- Complexity is an ongoing matter of assessment which is influenced by a multitude of factors throughout the life of the claim.¹⁸⁸
- 6.152. A WorkSafe agent submitted that assessment of risk against a clear definition of complex claims should be continually reviewed and assessed. Triggers to review a claim could be time-based (e.g. at acceptance then monthly) and/or triggered by key claim events or milestones (e.g. capacity change, surgery approved, becoming employer detached, etc).¹⁸⁹
- 6.153. Xchanging noted that triage occurs at several stages throughout the claim lifecycle; at claim assessment, the onset of risk factors, duration, or separation of employment. Assessment of a claim at these points is focused on the worker's return to work.¹⁹⁰
- 6.154. Another agent indicated that it had introduced early intervention and triage practices into its complex claims management approach, as well as initiatives to enhance the workers' compensation experience.¹⁹¹ The agent strongly believes that consideration needs to be given to a person's individual circumstances when managing their claim, to ensure a biopsychosocial approach is being applied.

Recent WorkSafe initiatives

- 6.155. In recent times, WorkSafe has used data and analytics with the aim of improving its understanding of the characteristics and needs of claims.
- 6.156. WorkSafe advised that it is developing and testing new possible triage models to stream claims in a needs-based way, rather than focusing primarily on the duration of the claim, as it currently does. Claims will initially be segmented into WorkSafe's four 'future state' case segments, 'guided', 'supported', 'assisted' and 'long tail'.¹⁹²
- 6.157. The new triage models aim to identify workers with complex needs who require higher and more tailored levels of support. The characteristics of workers in each segment are described in Table 4 below. WorkSafe advised that these are working definitions for the purposes of the Recovery Model Office pilot and are expected to evolve.

188 Submission DP27 (Gallagher Bassett).

189 Submission DP55 (WorkSafe agent, name withheld).

190 Submission DP58 (Xchanging).

191 Submission DP59 (WorkSafe agent, name withheld).

192 WorkSafe Victoria, 'Independent Reviewer RMO Briefing Nov 2020' (Presentation, November 2020) ().

Improving the experience of injured workers

Table 4: Characteristics of workers in segments.¹⁹³

Guided	<ul style="list-style-type: none"> • Worker has an injury where full recovery is expected quickly • Worker has returned to work or is expected to do so in short term • Good employer compliance and case performance history • Self supported, little if any additional support required
Supported	<ul style="list-style-type: none"> • Worker has illness or injuries where a longer recuperation is expected • Worker or employer unable to self manage their case (e.g. worker has no experience in managing an injury) • Needs for hands-on support in facilitating recovery • Presence of barriers to recovery
Assisted	<ul style="list-style-type: none"> • Worker has a more serious injury or multiple injuries, likely to have long-term effects • High needs for support services • Significant barriers to recovery • Access to multiple different services needed (eg; home modifications)
Long tail	<ul style="list-style-type: none"> • Varied injury types often with secondary mental injury, long term medication use • Worker has been on the scheme for many years, often resulting in distrust.

Recovery Model Office

6.158. One of WorkSafe's initiatives since the Ombudsman's 2019 report is the Recovery Model Office (RMO).

6.159. WorkSafe agent Gallagher Bassett is partnering with WorkSafe in the RMO. Commencing on 1 June 2020 for a pilot period of 12 months, the RMO will manage 600 claims in the 'guided' and 'supported' streams.¹⁹⁴

6.160. Gallagher Bassett describes a core objective of the RMO as reducing claims from becoming complex through the use of an operating system that is:

¹⁹³ WorkSafe Victoria, 'Independent Reviewer RMO Briefing Nov 2020' (n 192) ().

¹⁹⁴ Consultation 22 (WorkSafe Victoria session 2).

Improving the experience of injured workers

transparent, simplified and automated where possible, while providing services tailored to workers' individual injuries, and differentiating the service offered to workers based on need.¹⁹⁵

- 6.161. The RMO triage model applies predictive analytics using a set of forty features. The features include injury type, days between injury and lodgement of claim with the employer, worker demographics, employer and industry features.¹⁹⁶ Information on the features is obtained from a variety of sources including the claim form, certificates of capacity, employer registration form, and internal information held by the relevant agent.¹⁹⁷
- 6.162. The RMO pilot is testing whether the predictive analytics are accurate in matching workers with the tailored support to provide a needs-based service.
- 6.163. WorkSafe uses a spreadsheet to analyse the predictive data and segment claims into the 'guided' or 'supported' streams. This segmentation is based on available data and analytics.¹⁹⁸
- 6.164. Once allocated into the 'guided' stream, workers can be transferred to the 'supported' stream. At the time of the consultation, approximately 22 of the 300 workers in the 'guided' stream had been transferred to the 'supported' stream for more tailored, individualised support. WorkSafe has not moved workers with claims in the 'supported' stream to the lower level of care in the 'guided' stream. WorkSafe advised that this was a deliberate decision to ensure that the injured workers were not harmed by being transitioned to a lower level of care.¹⁹⁹ This is necessary to avoid the mistakes made by icare in New South Wales.²⁰⁰
- 6.165. WorkSafe engaged a consultant, Quantum, to develop an evaluation framework for the products and services tested in the RMO. Evaluation of the RMO will occur in several ways to determine what should be considered 'success' for individual claims in the RMO.²⁰¹
- 6.166. As there is some delay in obtaining meaningful evaluation data, WorkSafe has engaged another consultant, Wallis, to collect qualitative data through surveys of

195 Submission DP27 (Gallagher Bassett) 41.

196 WorkSafe Victoria, 'Quantum Detail Pack' (n 176).

197 Email from [REDACTED] (WorkSafe) to Kirsten McKillop, Director Independent Agent Review, 3 December 2020.

198 Consultation 22 (WorkSafe Victoria session 2).

199 Consultation 22 (WorkSafe Victoria session 2).

200 See 6.84—6.85 above.

201 Consultation 22 (WorkSafe Victoria session 2).

- injured workers and employers, comparing the RMO group and an agent control group. WorkSafe use this qualitative data and the RMO's quantitative data to assess whether the products and services tested in the RMO are achieving the intended benefits.²⁰²
- 6.167. WorkSafe advised that approximately 1,200 surveys had been completed by November 2020. WorkSafe also advised that it is performing 'on the ground' evaluation in real time, so that improvements can be made as the pilot progresses.²⁰³
- 6.168. WorkSafe indicated that early results suggest the claims triage tool is accurate in identifying different levels of complexity (guided and supported), noting that the RMO used a very low level of technology. Applying appropriate technology is WorkSafe's next step in developing the model.²⁰⁴
- 6.169. A common sentiment I heard from WorkSafe was that significant investment in technology would be required if WorkSafe was to expand the RMO model or numerous other initiatives.²⁰⁵
- 6.170. Comprehensive evaluation of the RMO will provide valuable insights for WorkSafe to further develop claims management processes, including those to identify workers who have, or have the potential to have, complex needs.
- 6.171. Dr Robyn Horsley submitted that while this pilot was trialling a very worthwhile approach, 'other options for early identification of potential complex cases (biopsychosocial definition) also need to be considered.'²⁰⁶
- 6.172. WorkSafe have advised that the RMO includes a few questions which target biopsychosocial factors. However, the Review has also heard that psychosocial risk factors are not systematically identified and addressed in the WorkSafe model.²⁰⁷
- 6.173. The principles underlying the RMO, in particular segmenting claims into the appropriate stream, rely on WorkSafe being able to identify those cohorts accurately.

202 Consultation 22 (WorkSafe Victoria session 2).

203 Consultation 22 (WorkSafe Victoria session 2).

204 Consultation 22 (WorkSafe Victoria session 2).

205 See, eg, Consultations 22 (WorkSafe Victoria session 2), 32 (WorkSafe Victoria session 3).

206 Submission DP25 (Dr. Robyn Horsley) 4.

207 Submission DP25 (Dr. Robyn Horsley).

Improving the experience of injured workers

6.174. As discussed at 6.84–6.85, icare's implementation of a new claims operating model in 2018 provides an all too real example of the implications for injured workers and a workers' compensation scheme more broadly, when segmentation (or 'triage') is flawed. This flawed segmentation was a contributing factor to the significant deterioration in the performance of the Nominal Insurer, including poorer return to work rates, and underwriting losses identified by the Dore Report.

7. Management of complex claims

*'I have lost count of the number of time[s] my patients have been re-traumatised and have become suicidal ...and I believe that in many ways the system is to blame for many of the 'complex' presentations I see. Indeed, the whole process is a bit like gaslighting—making people in a terrible system believe that they are the problem.'*¹

*'The feeling of being personally victimised, neglected, abused and made to feel powerless by a multi-national agent that I had no choice but to trade with, whom the regulator regarded as 'one of the better' agents leaves me without any doubt that people have committed suicide as a result of the treatment meted out by agents.'*²

Key points

- WorkSafe Victoria and its agents' current approach to complex claims management is process-driven and insufficiently individualised.
- WorkSafe's and its agents' consideration of workers' biopsychosocial factors and application of targeted initiatives to respond to these factors is inconsistent and inadequate.
- Better practice workers' compensation claims management should provide health-led 'case management', rather than a biomedical or insurance-led approach.
- Empirical evidence and examples of practices in other schemes point to better practices which may be able to be adapted to the Victorian workers' compensation context.

1 Survey reference (practitioner) 264943.

2 Submission DP61 () 13.

Purpose of the chapter

- 7.1. The purposes of this chapter are:
- to describe how complex claims are currently managed in Victoria under the agent model;
 - to identify better or best practice complex claims management; and
 - to examine some recent initiatives by WorkSafe and its agents that have sought to give effect to those principles of best practice.
- 7.2. In the previous chapter, I examined how to identify risks that workers' compensation claims could become complex, in the sense of delaying an injured worker's recovery. As noted in that chapter, the identification of risk is not an end in itself. The purpose of risk identification is to enable timely, targeted interventions to respond to those risks, maximising the prospects of recovery for claimants. This is in the best interests of injured workers, their employers, the workers' compensation scheme and ultimately the broader community.
- 7.3. To inform my position on best practice claims management, I examine:
- the evidence provided to me about current practices during consultation and in submissions;
 - best practice claims management as explained in relevant research;
 - how claims are managed under other compensation schemes; and
 - recent examples of claims management under the Victorian workers' compensation scheme that show promise.

Victoria's current approach to managing complex claims

- 7.4. As described in Chapter 6, the complexity of a claim may be a function of more than just its duration. Many claims can be identified as complex or at risk of becoming complex well before 130 weeks.
- 7.5. WorkSafe's current claims management model does not define 'complexity' for identification and intervention purposes. As noted in Chapter 6, agents currently segment claims primarily based on the duration of a claim, rather than the worker's needs.
- 7.6. While 'complexity' is not defined, WorkSafe's claims manual refers to complexity in some contexts, including:

Improving the experience of injured workers

- 'A return to work specialist may be required to manage a complex RTW [return to work] claim.'³
- 'For complex claims with unresolved medical and treatment issues the Medical Advisor should be consulted.'⁴
- 'Multiple [Independent Medical Examiner] examinations with different specialities may be required where: the worker has multiple or complex injuries or a complex medical condition'⁵
- General Practitioners can be asked to complete a report 'depending on the complexity' of the claim.⁶
- An 'Activities of Daily Living Assessment' with an occupational therapist should be considered for 'complex household help requirements' or where 'the worker has a complex social situation'.⁷
- Household help should be reviewed annually if a worker has '[s]evere or complex injuries where further functional restoration is unlikely'.⁸
- 'Advice should be sought 'from a suitably qualified person' with injury management expertise if a treating practitioner questionnaire reveals 'complex or unresolved' issues'.⁹

Multidisciplinary approach to claims management

7.7. When managing claims for weekly payments, agents are required to manage a claim using a multidisciplinary approach.¹⁰

7.8. A case manager's responsibilities are described in the claims manual as:

- coordinating the multidisciplinary approach;
- actively communicating with relevant parties;
- managing claims for weekly payments and paying appropriate compensation;
- determining the ongoing right to compensation; and
- consulting with suitably qualified persons about critical medical and [return to work] decisions.¹¹

3 WorkSafe Victoria, 'Claims Manual' (Web Page, 2020) pt 2.6.3.1 <www1.worksafe.vic.gov.au/vwa/claimsmanual/Home.htm> ('WorkSafe Claims Manual').

4 WorkSafe Claims Manual (n 3) pt 2.6.1.4.

5 WorkSafe Claims Manual (n 3) pt 2.7.2.2.

6 WorkSafe Claims Manual (n 3) pt 2.7.1.2.

7 WorkSafe Claims Manual (n 3) pt 4.5.20.2.

8 WorkSafe Claims Manual (n 3) pt 4.5.20.6.

9 WorkSafe Claims Manual (n 3) pt 5.6.3.

10 WorkSafe Claims Manual (n 3) pt 2.6.3.

11 WorkSafe Claims Manual (n 3) pt 2.6.3.1.

7.9. The claims manual describes the 'multidisciplinary approach' as follows:

The multidisciplinary approach is a comprehensive and coordinated method to manage the rehabilitation and compensation aspects of a claim. It encourages active management of claims in a manner that promotes an early, safe and sustainable return to work and community activities in a cost-effective manner.

The approach is a proactive, results-oriented process that relies on Case Managers to coordinate a range of services on behalf of the worker. The focus is to ensure there is the level of support necessary to address the worker's needs and to optimise return to work.

By using a broad range of specialist skills, such as technical and medical skills, a multidisciplinary team (MDT) can better identify and address the worker's needs and enable early and active intervention..¹²

7.10. The claims manual explains how specialists should be used but does so in a very non-prescriptive fashion. It appears to leave considerable latitude for agents to interpret how to apply the multidisciplinary approach, when to involve specialists, and any qualifications required for specialists:

A Case Manager arranges a case conference including people who can provide specialist advice on:

- legislative entitlements and legal issues - *may* be a suitably qualified person (technical). Advice may also be sought from a Senior Legal Manager;
- treatment and rehabilitation support (*may* be a dedicated Injury Management Advisor who *can* seek diagnosis and prognosis advice from a Medical Advisor);
- a RTW Specialist *may* be required to manage a complex RTW claim..¹³

7.11. If used effectively, a multidisciplinary approach should ensure that an injured worker receives tailored treatment and support. It could help reduce the risk of a worker's claim becoming complex by facilitating the right support at the right time. It could also help provide appropriate services to support an injured worker's recovery where their claim is already 'complex'.

7.12. However, the evidence provided in submissions and during consultation suggests that while the claims manual requires a multidisciplinary approach to claims management, this is not implemented consistently. Submissions do not describe

¹² WorkSafe Claims Manual (n 3) pt 2.6.3.1.

¹³ WorkSafe Claims Manual (n 3) pt 2.6.3 (emphasis added).

a 'comprehensive and coordinated method to manage the rehabilitation and compensation aspects of a claim'.

Extent to which biopsychosocial factors are addressed in complex claims management in Victoria

- 7.13. In Chapter 6, I described biopsychosocial factors and their relevance to triaging claims to ensure the services provided respond to the needs of the injured worker. Correctly matching the needs of the worker with the level of support and services provided helps manage complex claims and avoid some claims becoming 'complex'.
- 7.14. Policy documents of workers' compensation schemes in Australia indicate that they aim to apply the biopsychosocial model to claims and injury management. This has been the case for many years. For example, the Heads of Workers' Compensation Authorities published a guide in 2011 providing harmonised definitions for biopsychosocial terms.¹⁴
- 7.15. Despite the widespread agreement among schemes and experts that biopsychosocial factors are important in the management of complex claims, there is limited evidence that WorkSafe or its agents consistently apply a biopsychosocial approach to claims management. Responses in consultation and submissions described in this chapter suggest that management of claims for injured workers does not respond adequately to their individual circumstances.
- 7.16. The term 'biopsychosocial' does not feature in WorkSafe's current claims manual other than in reference to clinical assessments for persistent pain. The manual states that principles of managing persistent pain include the need for 'a comprehensive assessment to consider the whole person by assessing the biological, psychological and social (biopsychosocial) factors in order to develop a coordinated treatment plan'.¹⁵
- 7.17. Although there is no other specific reference to biopsychosocial factors, the claims manual does illustrate person-centred biopsychosocial factors in its instructions regarding evidence of reasonable efforts to return to work.¹⁶
- 7.18. Figure 7 is part of WorkSafe's guidance to agents in its claims manual.

14 Heads of Workers' Compensation Authorities and Heads of Compulsory Third Party, *Biopsychosocial Injury Management* (Position paper, June 2011).

15 WorkSafe Claims Manual (n 3) pt 4.5.33.

16 The return to work requirements under Part IV of the WIRC Act are discussed in Chapter 3 of this report.

Figure 7: Considerations for reasonable efforts to return to work.¹⁷



Responses on current claims management practices

7.19. Nearly everyone with whom I consulted considered that the current management of complex claims under the agent model is unsatisfactory or ineffective.¹⁸

7.20. It is noteworthy that studies dating back to 2003, which explore the experiences of Australian injured workers, have described negative financial, social and mental health effects from:

- relationships with claims staff 'characterised by miscommunication, deception and depersonalisation of the individual';

¹⁷ WorkSafe Claims Manual (n 3) pt 5.1.1.

¹⁸ See, eg, Consultations 1 (Roundtable with medical and rehabilitation provider peak bodies), 7 (Roundtable with legal services peak body and provider groups), 8 (Roundtable with union group 1); Submissions DP1 (ACCS), DP2 (Aegis), DP8 (ACJ Monash), DP12 (AMWU), DP16 (ASU), DP45 (Slater and Gordon Lawyers), DP48 (TPAV), DP51 (Uniting Victoria).

- delays with communication and approvals;
- bureaucratic and process-driven practices which impact on a worker's understanding of, and participation in, the claim or recovery process;
- the need to continuously prove legitimacy of their injury;
- loss of control, power, identity and living standards.¹⁹

7.21. Submissions to the Review reflect that some current day experiences of the Victorian workers' compensation scheme are not dissimilar.

*'Listen to the treating professionals and stop insurance companies from doctor shopping. Stop treating our parent like a criminal. Stop playing with her head trying to make her mental. Just give the treatment her doctors ask for so she can get on with life'.*²⁰

– support person for an injured worker

7.22. In the sections below I describe what I was told about the key problems associated with how complex claims are currently managed.

7.23. The Australian Services Union effectively summarised the views expressed by many:

[T]he current system is ineffective. It does not achieve positive health outcomes. The system is characterised by delay, and workers feel like another number in an insurance scheme where there is no personalised approach. There is little acknowledgement that the agents are in fact dealing with the health, wellbeing and livelihoods of workers.²¹

7.24. Recurring comments from multiple submissions supported the Australian Services Union's view.²² Particular issues with case management of complex claims, which are described in more detail in the sections below, included:

- Case managers change frequently, creating a lack of continuity in case management.²³

19 Dean et al, 'Scoping review of claimants' experiences within Australian workers' compensation systems' (2018) 43(4) *Australian Health Review* 462.

20 Survey reference (support person) 265694.

21 Submission DP16 (ASU) 2.

22 See, eg, Submissions DP22 (Craig's Table), DP45 (Slater and Gordon Lawyers), DP48 (TPAV).

23 See, eg, Submissions DP7 (AMIEU), DP13 (AMIC), DP23 (Dr. Mary Wyatt), DP45 (Slater and Gordon Lawyers), DP62 (ESSA); Survey references (practitioner) 265297, (workers) 265681, 261444, (industry professional) 364980.

Improving the experience of injured workers

- The system is not sufficiently flexible to support individual needs.²⁴
- The advice of Independent Medical Examiners is prioritised ahead of the advice of treating medical practitioners.²⁵
- There are unsatisfactory delays in decision-making.²⁶
- Case managers lack capability and need more training.²⁷
- Claims management needs to be 'person-centred', focused on the injured worker as the key concern.²⁸
- There is a need to better identify and manage biopsychosocial complexity in injured workers.²⁹
- Workers feel that they are required to 'fight' for everything.³⁰

Changes in case manager

7.25. Many people told me that injured workers have their claims reassigned to several different case managers over the course of the claim.³¹

7.26. Injured workers and their families who responded to the survey overwhelmingly described high case manager turnover and poor case manager communication. Examples provided of high case manager turnover include:

- fourteen in four years;³²
- more than twenty in two years;³³
- ten in less than nine months;³⁴

24 See, eg, Submissions DP4 (ANMF), DP11 (ALA), DP22 (Craig's Table), DP27 (Gallagher Bassett), DP30 (HACSU), DP48 (TPAV), DP55 (WorkSafe agent, name withheld).

25 See, eg, Submissions DP16 (ASU), DP30 (HACSU), DP43 (RACGP), DP45 (Slater and Gordon Lawyers), DP52 (VAU), DP54 (VTHC), DP61 (██████████), OP13 (VFF). This sentiment was disputed by an employer survey reference (employer) 264602.

26 See, eg, Submissions DP15 (ARPA), DP21 (CAC), DP35 (IWSN), DP43 (RACGP), DP49 (UFU), DP54 (VTHC); Survey references (workers) 262191, 262810, 262763, (employer) 264827.

27 See, eg, Submissions OP7 (Expert academic and medical professional group), DP3 (Alan Clayton), DP21 (CAC; Survey references (professional) 264032, (worker) 265726.

28 See, eg, Submissions DP6 (RACP), DP16 (ASU), DP25 (Dr. Robyn Horsley), DP43 (RACGP), DP52 (VAU), DP54 (VTHC); Survey references (worker) 264934, (support person) 264938.

29 See, eg, Submissions DP21 (CAC), DP36 (IWHG Monash), DP42 (Occupational rehabilitation provider, name withheld), DP52 (VAU).

30 See, eg, Submissions DP7 (AMIEU), DP26 (██████████), DP39 (LIV), DP44 (SDA); Survey references (workers) 261363, 261725, 263807, 264171, 260689, 265045, 261550, (support person) 263624.

31 See, eg, Submissions DP1 (ACCS), DP8 (ACJI Monash), DP10 (Ai Group), DP12 (AMWU), DP13 (AMIC), DP45 (Slater and Gordon Lawyers).

32 Survey reference (practitioner) 265656.

33 Survey reference (worker) 264953.

34 Survey reference (worker) 262311.

Improving the experience of injured workers

- more than twelve in six years;³⁵ and
 - almost monthly at points.³⁶
- 7.27. The following negative effects of frequent changes of case managers were identified:
- inconsistency in decisions made by different case managers;
 - interruption in relationships between injured workers and case managers; and
 - injured workers having to repeat their case history multiple times.³⁷
- 7.28. Many submissions expressed a preference for claims management by a single case manager. The Australasian Meat Industry Council, for example, recommended '[s]trict adherence that once assigned, the case manager should remain with the claim until resolution'.³⁸
- 7.29. In contrast to these views, representatives of the workers' compensation scheme of British Columbia, Canada (WorkSafeBC), advised that some staff turnover can be a good thing. If people do not leave roles, staff employed under one approach to claims management may cease to be a good fit as a scheme evolves.³⁹
- 7.30. The case study below describes one injured worker's experience of delays in claims management, and changes in case managers.

Case study – 'Carmel'

Slater and Gordon Lawyers told the Review they 'recently represented a worker with a complex medical history who suffered a neck injury at work in 2017. A request for surgery on the cervical spine was sent to the agent on 3 January 2020. A second request for surgery, marked "***URGENT***" was sent to the agent by the surgeon on 18 May 2020. The worker subsequently attended a second treating surgeon, who made a request for funding ... WorkSafe's clinical panel ... approved the request for surgery at the beginning of July 2020. The treating surgeon stated that he was stunned at the extent of the danger of adverse consequences which the worker had faced due to the delays by the agent, in particular a significant risk of paralysis and loss of arm use'.⁴⁰

35 Survey reference (worker) 262311.

36 Survey reference (worker) 261451.

37 See, eg, Submissions DP7 (AMIEU), DP8 (ACJI Monash), DP45 (Slater and Gordon Lawyers).

38 Submission DP13 (AMIC) 4.

39 Consultation 24 (WorkSafeBC).

40 Submission DP45 (Slater and Gordon Lawyers) 8.

The Review spoke to 'Carmel', the subject of this case study. Carmel told the Review that she was one of thousands of stories in the system. Carmel said her experience with the system was really difficult: *'you start with a condition and end up with more ... conditions by the time the whole process finishes'*.

Carmel described the pressures of dealing with different case managers who haven't read your file properly and then miss information about your claim: *'my psychologist asked me "This is like a full-time job for you, chasing them [the agent] up?" and I said "yes, it is"'*.

The Review asked Carmel what would have supported her in her dealings the system. Carmel highlighted improved communication: *'I think it would have been good to have a consistent case manager'*.

Carmel said that case managers have 'little decision-making power. They rely on the medical advisor and I don't get those details'.

The system is not sufficiently individualised

- 7.31. The current management of complex claims was regularly described as a 'one size fits all' approach.⁴¹ Aegis Risk Management Services stated that such a system 'does not allow for the interventions required to address the barriers associated with complex claims'.⁴²
- 7.32. Unions and injured workers' representatives said that injured workers 'feel like a case number, rather than a person with unique needs'⁴³ and that they 'are churned through the system in order to generate income for the system'.⁴⁴
- 7.33. The Australian Manufacturing Workers Union stated that there is 'a blatant lack of respect for the claimant who is often in pain ... and an irrational failure to address the individual needs'.⁴⁵ The Australian Services Union suggested that tailored treatment and a personalised approach would lead to better decision-making. It said that agents needed to take more account of individual circumstances.⁴⁶
- 7.34. By contrast, a current agent, Gallagher Bassett, submitted that its claims management model does provide tailored support to injured workers. It noted that injured workers have increased access to Gallagher Bassett's inhouse

41 See, eg, Submissions DP1 (ACCS), DP2 (Aegis), DP8 (ACJII Monash), DP11 (ALA), DP48 (TPAV).

42 Submission DP2 (Aegis) 18.

43 Submission DP7 (AMIEU) 8.

44 Submission DP22 (Craig's Table) 3.

45 Submission DP12 (AMWU) 2.

46 Submission DP16 (ASU).

specialised services, depending on the complexity of their claim.⁴⁷ Another agent made similar observations.⁴⁸

7.35. It is clear that despite this, not all injured workers are experiencing tailored and individualised support. Survey respondents to the Review were asked if the Victorian workers' compensation system provides tailored support and treatment for injured workers based on individual circumstances and medical advice. Most responses said that it did not; less than ten percent of respondents, and only one worker respondent, agreed that the current system provides tailored support. Survey responses included:

- 'Victorian workers' compensation system does not provide tailored support and treatment for injured workers based on individual circumstances and medical advice';⁴⁹
- 'Insurers do not provide a human centred approach as the program is financially driven';⁵⁰ and
- 'Nothing is tailored'..⁵¹

Selective use of medical advice: 'doctor shopping'

7.36. A consistent theme in submissions was that agents preference the opinions of Independent Medical Examiners (IMEs) over those of treating practitioners.⁵² The role of IMEs under the WIRC Act is discussed in greater detail in Chapter 3.

7.37. The Royal Australian College of General Practitioners suggested that IMEs are partisan in their opinions because agents commission them. It also submitted that agents frequently preference an IME report based on a single assessment over a general practitioner's view, which is usually based on a more extensive case history.⁵³

7.38. Slater and Gordon Lawyers stated 'the evidence of [IMEs] is routinely preferred to that of treating doctors, despite treaters clearly having more knowledge of the issues, the worker's background and condition'..⁵⁴

47 Submission DP27 (Gallagher Bassett).

48 Submission DP59 (WorkSafe agent, name withheld).

49 Survey reference (worker) 257817.

50 Survey reference (support person) 264938.

51 Survey reference (worker) 261451.

52 See, eg, Submissions DP11 (ALA), DP14 (APS), DP30 (HACSU), DP45 (Slater and Gordon Lawyers), DP54 (VTHC); Survey reference (worker) 261550.

53 Submission DP43 (RACGP).

54 Submission DP45 (Slater and Gordon Lawyers) 7.

Improving the experience of injured workers

- 7.39. Similarly, the Victorian Ambulance Union said that the treating medical practitioner's opinion is often ignored. It believes agents prefer the opinion of IMEs where it will justify a reduction of benefits for the worker.⁵⁵
- 7.40. The Australian Services Union said that when workers' needs are being assessed, the opinions of treating medical practitioners should receive greater emphasis.⁵⁶
- 7.41. Injured workers responding to the survey reported that agents do not listen to the advice of treating practitioners:

Medical advice is often ignored. I feel I need to 'fight' for the care I need, rather than focusing on my recovery... My specialist has asked for a home-based treatment as I live in rural Victoria. I have to travel five hours a day to Melbourne to access the treatment that has been suggested. Rather than approve it or consult the specialist in a timely manner, they ask for more information. This is time wasting, costly and affects my poor health.⁵⁷

- 7.42. Conversely, some employers or employer representative groups suggested that treating practitioners are too close to their patients for objectivity.⁵⁸ An employer response to the survey commented that:

There is a common view that treaters do have a tendency to advocate for their client rather than assisting with RTW [return to work] outcomes.⁵⁹

- 7.43. The Ombudsman's 2016 report stated that:

in some cases agents' choice was plainly motivated by the opportunity to obtain an opinion from an IME who was considered to hold particular views adverse to an injured worker... (and) some cases of agents "shopping" for an IME opinion by going to multiple doctors until they received an opinion that would allow them to terminate.⁶⁰

- 7.44. Subsequent to this, the Ombudsman's 2019 report noted that measures had been introduced to prevent agents repeatedly using the same IME.⁶¹ These include centralising bookings for psychiatric IME examinations and requiring

55 Submission DP52 (VAU).

56 Submission DP16 (ASU).

57 Survey reference (worker) 264934.

58 See, eg, Submissions DP2 (Aegis), OP12 (VACC), OP13 (VFF); Survey references (employer) 266245, 264602, 263859.

59 Survey reference (employer) 263859.

60 Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight* (Report, 12 September 2016) 157.

61 Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019) 48-49, 209 ('Victorian Ombudsman 2019').

monthly reporting of IME usage by each of the agents. Despite these measures to prevent misuse of IMEs, the Health and Community Services Union said it still has ‘serious concern about the independence of several independent medical examiners.’⁶²

Delays and unreasonable decisions

- 7.45. I heard that for many workers, processes and decisions during claims management are slow.⁶³ Delays in decision-making have a negative impact on the injured worker.
- 7.46. Slater and Gordon Lawyers reported that there are sometimes significant delays in decision-making by agents with no clear timelines or updates given to workers.⁶⁴
- 7.47. The Accident Compensation Conciliation Service observed that it often hears complaints about a lack of communication and failures of agents to respond to requests. It noted that lengthy delays in responding to requests can lead to delays to an injured worker’s recovery and deterioration of their mental wellbeing:
- Delays in decision making frustrate and disempower injured workers from actively engaging in their return to work, and lead to a lack of rehabilitation and return to work interventions in the earlier stages of the claim.*⁶⁵
- 7.48. The Australian Services Union also noted that delays are common and can cause frustration and financial crisis.⁶⁶
- 7.49. The Police Association of Victoria described claims proceeding unnecessarily to court because of poor investigations by agents. The Association explained that the court frequently decides in the worker’s favour, which suggests that the court process and delay was unnecessary. This is supported by statistics provided by WorkSafe.⁶⁷ The Association stated ‘the lengthy process invariably worsens the workers’ injury considerably and is further exacerbated by financial stress and social isolation’.⁶⁸

62 Submission DP30 (HACSU) 7.

63 See, eg, Submissions DP45 (Slater and Gordon Lawyers), DP52 (VAU).

64 Submission DP45 (Slater and Gordon Lawyers).

65 Submission DP1 (ACCS) 5.

66 Submission DP16 (ASU).

67 Discussed at Chapter 3, 3.106.

68 Submission DP48 (TPAV) 4-5.

- 7.50. The Royal Australian College of General Practitioners submitted that agents 'frequently refuse the findings of mediation and force patients to participate in court proceedings and Medical Panels reviews in a strategy that lengthens claims and exhausts some patients in to giving up pursuit of their claim'.⁶⁹ The Australian Meat Industry Employees Union expressed the same view.⁷⁰
- 7.51. Injured workers' responses to the survey described claims management as characterised by unreasonable return to work expectations, treatment refusals and delays:

I was continually harassed to attend return to work meetings whilst waiting for the emergency surgery. No one from the insurance company, workcover or my workplace acknowledged the pain I was in despite letters from many medical professionals. My life has been ruined by these people.⁷¹

So often, the only option is to constantly take workcover to conciliation because everything is automatically rejected to 'wear down' the individual. It hurts. It's kicking the vulnerable person when they are fighting for care or support. It's inherently dehumanising.⁷²

- 7.52. Research studies describe increasing negative impacts that are caused by delays and extended time in the workers' compensation scheme.⁷³ One worker who responded to the survey explained:

I started off having a fairly simple injury or what I thought was a simple injury, however through lengthy delays and difficult case managers I now have a secondary mental injury that I will probably never get over.⁷⁴

Capability of case managers

- 7.53. Delays for workers with long term claims may be contributed to by unsatisfactory case manager capability. A survey from an industry professional suggested that case managers allocated to long term claims are typically less skilled and have larger portfolio sizes than those allocated to shorter-term claims.⁷⁵ Another survey response from an employer and a submission from a rehabilitation

69 Submission DP43 (RACGP) 2.

70 Submission DP7 (AMIEU).

71 Survey reference (worker) 264171.

72 Survey reference (worker) 261451.

73 See, eg, Collie et al, 'Injured worker experiences of insurance claim processes and return to work: a national, cross-sectional study' (2019) 19(1) *BMC Public Health* 927, 2.

74 Survey reference (worker) 262810.

75 Survey reference (industry professional) 264032.

Improving the experience of injured workers

provider also suggested that the financial incentives for agents are weighted toward early claims management, which results in more skilled resources in the 'front end'.⁷⁶

- 7.54. The Accident Compensation Conciliation Service submitted that people who triage and manage complex claims 'should have suitable qualifications ... and the training and life experience necessary to support stressed and suicidal workers, and to communicate effectively about decisions that have been made'.⁷⁷
- 7.55. One WorkSafe agent submitted that it recruits for varied capability and is able to cross-skill staff to accommodate the multiple roles in claims management, including 'return to work, mental health management, liability decision-making, whole person impairment assessments and like'.⁷⁸
- 7.56. Gallagher Bassett said that financial incentives allow agents to invest in employing staff with specialised capability such as psychologists. It also noted WorkSafe's provision of person-centred case management training to assist agent capability with complexities in claims management. This was to be completed by the end of 2020.⁷⁹
- 7.57. The importance of claims manager capability for effective complex case management is discussed later in this chapter at 7.181.

Employer engagement

- 7.58. Submissions and surveys from employers expressed concerns with the extent to which they are involved in the claims management and return to work process.⁸⁰ Australian Industry Group explained that:

Employers are not usually provided with the opportunity to respond to information provided by the claimant during a circumstance investigation. This can lead to a level of suspicion in relation to the process... If an employer feels that a decision to accept a claim is unjust, they are less likely to have a positive approach to supporting the worker which will ultimately reduce the likelihood of a successful return to work.⁸¹

76 Submission DP42 (Occupational rehabilitation provider, name withheld) 4; Survey reference (employer) 265322.

77 Submission DP1 (ACCS) 10.

78 Submission DP59 (WorkSafe agent, name withheld) 23.

79 Submission DP27 (Gallagher Bassett) 25.

80 See, eg, Submissions DP10 (Ai Group), DP13 (AMIC), DP41 (MBV), DP53 (VFF); Survey references (employers) 264030, 265413, 266245.

81 Submission DP10 (Ai Group) 18.

- 7.59. Numerous submissions and survey responses described the importance of effective employer engagement to prevent claims from developing complexity.⁸²

The Accident Compensation Conciliation Service submitted that:

Promoting education and engagement with employers, and actively identifying and managing workplace dynamics would better engage injured workers early in their rehabilitation and promote a return to work at the earliest opportunity. These early efforts can have lasting impacts for injured workers who can easily begin to feel disaffected and angry, which in turn affects recovery from both physical and secondary psychological injury. The same early intervention in primary psychological injury claims could offset catastrophic downward spirals that lead to entrenched grievance, illness and permanent disability.⁸³

- 7.60. Similarly, the Australian Rehabilitation Providers Association considered that:

Employers need to be considered as active participants in a multi-stakeholder scheme like the workers compensation scheme... Claim complexity does not always simply involve the injured party, and the relationship between the employer and the worker is a significant contributing factor to complexity.⁸⁴

A lack of person-centred claims management

- 7.61. Many submissions described a need for a more person-centred approach to claims management.⁸⁵ Several submissions suggested that WorkSafe's claims model is heavily process-focused. This was described as a remnant of a bio-medical insurance model where liability management was the key scheme priority.⁸⁶

- 7.62. Agents said that this has resulted in barriers to the scheme's ability to deliver a truly biopsychosocial, person-centred model. One agent submitted that 'many policies and procedures have been quite rigid in their implementation, restricting the ability for claims staff to be innovative and person-centred in their approach'.⁸⁷

82 See, eg, Submissions DP1 (ACCS), DP15 (ARPA), DP21 (CAC), DP35 (IWSN), DP41 (MBV), DP42 (Occupational rehabilitation provider, name withheld), DP44 (SDA), DP53 (VFF); Survey references (employer) 263859, (worker) 264374.

83 Submission DP1 (ACCS) 10.

84 Submission OP4 (ARPA) 4.

85 See, eg, Submissions DP6 (RACP), DP16 (ASU), DP25 (Dr. Robyn Horsley), DP43 (RACGP), DP52 (VAU), DP54 (VTHC); Survey references (worker) 264934, (support person) 264938.

86 See, eg, Submissions DP23 (Dr. Mary Wyatt), DP55 (WorkSafe agent, name withheld), OP7 (Expert academic and medical professional group).

87 Submission DP55 (WorkSafe agent, name withheld) 9.

Improving the experience of injured workers

- 7.63. This is not unique to WorkSafe Victoria. Recent reviews of the workers' compensation scheme in British Columbia, Canada recommended that that scheme needs to become more 'worker-centred'.⁸⁸
- 7.64. Agents described a tension between delivering entitlement reviews, which may result in a person losing their compensation entitlements and delivering a person-centred service.⁸⁹

A case manager is expected to be person-centred, coordinating care and support enabling workers to focus on recovery. Yet they are also responsible for entitlement reviews, to follow policy and procedures and complete administrative tasks. These tasks often require different skill sets and tension can develop when trying to balance the need to make difficult decisions on claims whilst building rapport and trust with workers to support successful recovery and RTW outcomes.⁹⁰

- 7.65. Dr Robyn Horsley, a member of the Review's expert panel, stated that:

The existing agent model focuses on financial viability. This has been the case since the financial problems of the nineties. It has moved away from a person-centred case management approach...There needs to be a seismic shift at all levels of the system to a person-centred case management approach. The system needs to identify cases that are complex in a biopsychosocial sense early and respond. This approach identifies biopsychosocial factors that need to be addressed; creates a tailored plan for the individual with the collaboration of all stakeholders; (and) regularly monitors progress against the goals identified.⁹¹

- 7.66. Surveys and submission responses illustrate the real-life implications of the failure to acknowledge and address an individual's biopsychosocial factors adequately. Workers report feeling ignored and dismissed, which breaks down cooperative engagement with the case manager.⁹²
- 7.67. An industry professional put it this way in their survey response:

(T)he workers' compensation scheme has no ability to be flexible which in turn adds extra emotional, and oft time financial, stress for the injured worker. When attempting to explain this and many more issues to a case manager, injured workers

88 Terrance Bogyo, *Balance. Stability. Improvement. Options for the Accident Fund* (Report, 6 December 2018); Paul Petrie, *Restoring the Balance: A Worker-Centred Approach to Workers' Compensation Policy* (Report, 31 March 2018); Janet Patterson, *New Directions: Report of the WSCB Review 2019* (Report, 20 October 2019).

89 Submission DP55 (WorkSafe agent name withheld), OP8 (Gallagher Bassett).

90 Submission OP16 (WorkSafe agent, name withheld) 6.

91 Consultation 17 (Expert session 1).

92 See, eg, Survey references (workers), 262191, 262810; Submissions DP61 (██████████), DP33 (Individual submission 1, name withheld), DP26 (██████████).

are bluntly told that none of that is of any importance. So a thin layer of resentment is set in place. Over time the resentment layer builds and builds.

A case manager needs to understand how to listen to what is being said by the injured worker instead of through the required framework of cost control from the claims agent currently there are an unknown number of angry Facebook groups of injured workers. WorkSafe Victoria does not engage with these groups instead labelling them as antagonistic and unwanted... (the) system has been 'trained' to ignore the groups, forcing them underground. Whereas if they were invited to join a serious focus group where the angst and issues could be discussed and resolutions worked towards I believe that WorkSafe Victoria would gain inside information that would enable WorkSafe Victoria to become proactive and be able to prevent systemic issues from occurring.⁹³

Best practice complex claims management – the research

- 7.68. Claims management is an integral part of all injury compensation schemes. Extensive empirical evidence describes the significant positive effects that good claims management practices can have on a worker's physical, mental, social and financial wellbeing.⁹⁴
- 7.69. Traditional principles behind insurance-led best practice personal injury claims management are said to be 'tailored, timely, coordinated, multi-dimensional and multi-disciplinary'.⁹⁵ While such principles remain relevant, they are somewhat process-focused, rather than person-focused.
- 7.70. In contrast, **health-led** 'case management' guiding principles aim to:
- facilitate the personal development of clients;
 - advocate for client rights; and

93 Survey reference (industry professional) 259363.

94 See, eg, K Lippel, 'Workers describe the effect of the workers' compensation process on their health: A Québec study' (2007) 30 *International Journal of Law and Psychiatry* 427; Kilgour et al, 'Interactions Between Injured Workers and Insurers in Workers' Compensation Systems: A Systematic Review of Qualitative Research Literature' (2014) 25(1) *Journal of Occupational Rehabilitation* 160; ISCR, *Victorian Injured Worker Outcomes Study (VIWOS) 1-3 Study* (Report, 2018); Dean et al, 'Scoping review of claimants' experiences within Australian workers' compensation systems' (2018) 43(4) *Australian Health Review* 457; Collie et al (n 73); Collie, Di Donato and Iles, 'Work Disability in Australia: An Overview of Prevalence, Expenditure, Support Systems and Services' (2019) 29(3) *Journal of Occupational Rehabilitation* 526.

95 Institute of Actuaries of Australia, *Accident Compensation Claims Management – Lessons Learnt and Claimant Outcomes* (Paper, November 2009) 2.

- provide purposeful case management.⁹⁶

Case management vs claims management

Case management can apply in a variety of contexts, including legal, health, insurance and social services.

The Case Management Society of Australia defines 'case management' as 'a collaborative process of assessment, planning, facilitation and advocacy for options and services to meet an individual's holistic needs through communication and available resources to promote quality cost-effective outcomes'.⁹⁷

'Case management' and 'claims management' are typically used interchangeably in a workers' compensation setting. For example, WorkSafe's claims manual states that 'when managing claims... agents are required to: develop a claim summary with a case management strategy'.

However, the Review has heard that there is an important distinction between 'claims management', an insurance industry concept, which is not person-centred, but rather liability focused and 'case management', which was described as person-centred.

7.71. Safe Work Australia's 'best practice framework for the management of psychological claims' provides a comprehensive evidence-base to guide claims management for workers who may have, or may be at risk of, a psychological injury or illness. Key pillars of the framework are:

- person-centred claims management focusing on the worker's social and economic wellbeing, including connection to work;
- the need for intervention at the individual, organisational and system levels; and
- continuous improvement using feedback, evaluation and new evidence of emerging better practices.⁹⁸

7.72. WorkSafe's 2017-18 annual report noted that it was adopting Safe Work Australia's best practice framework for the management of psychological

96 Cooper and Yarmo Roberts, 'National Case Management Standards in Australia – purpose, process and potential impact' (2006) 30(1) *Australian Health Review* 12; Mission Australia, *National Case Management Approach* (Guide, 2020).

97 Case Management Society of Australia, 'Case Management Definitions' (Web page, 2017) citing Marfleet, F., Trueman, S. & Barber, R. 'National Standards of Practice for Case Management' *Case Management Society of Australia & New Zealand* (3rd Edition, 2013).

98 SuperFriend and Safe Work Australia, 'Taking action: a best practice framework for the management of psychological claims in the Australian workers' compensation sector' (Report, 2018) ('Taking action').

claims.⁹⁹ However, this adoption does not appear to be reflected in the claims manual or on WorkSafe's website.

7.73. WorkSafe advised me that it continues 'to build on the foundations implemented in 2018 and to work towards best practice'.¹⁰⁰ Key improvements WorkSafe identified as occurring since 2018 are:

- an increase from five (one per agent) to 15 psychological/mental health resources embedded in the agents;
- all accepted primary mental injury claims are reviewed by these specialists following acceptance;
- mobile case managers dedicated to provide support on complex mental injury claims; and
- ongoing improvements in the use of analytics for triage (for example, text tagging for secondary mental injury) and case conferencing to support recovery.¹⁰¹

Person-centred claims management

7.74. Research supports the conclusion that biopsychosocial claims management, which positions a worker to be at the centre of their recovery process, is integral to best practice claims management.¹⁰²

7.75. Consultation with agents and the Review's expert panel suggested that workers' compensation schemes have legislative, policy and design aspects which are built on a biomedical model.¹⁰³ This results in a focus on facilitating medical care, income replacement and return to work services. However, social services and community supports are less accessible to injured workers under this model. A biomedical model makes it more difficult to address personal biopsychosocial factors which impact on the worker's recovery and ability to return to work.¹⁰⁴

99 WorkSafe Victoria, *Annual Report 2017-18* (Report, 2018) 24.

100 Email from [REDACTED] to Kirsten McKillop, Director – Independent Agent Review, 16 March 2021.

101 Email from [REDACTED] to Kirsten McKillop, Director – Independent Agent Review, 16 March 2021.

102 See, eg, Stratil and Swincer, *Return to Work SA, Enhancing early psychosocial risk assessment and intervention* (Report, 2012) 3; Leembruggen and Pejic, 'Victorian Injured Worker Outcomes Study (VIWOS): Phases 1-3' (Summary Report, October 2018).

103 See, eg, Consultations 2 (Roundtable with WorkSafe agents), 17 (Expert session 1).

104 White, C. et al, 'The Influence of Social Support and Social Integration Factors on Return to Work Outcomes for Individuals with Work-Related Injuries: A Systematic Review' (2019) 29 *Journal of Occupational Rehabilitation*, 636.

Improving the experience of injured workers

The only measurement available is return to work, which is not a reflection of a worker returning to full health. Even if the metric of return to work has been ticked, poor health and other complexities may still be there.¹⁰⁵

There are also further steps that could be taken to provide social connection/ connect people back to the community. Traditionally, treatment has had the general practitioner at the centre, but there is opportunity to increase community-coordination..¹⁰⁶

- 7.76. This is significantly different to a model of processes which revolve around a worker, but do not actively engage them. Examples of person-centred principles include:
- All parties acting with integrity and intentionally helping workers to take an active role in their own claim and recovery.
 - Providing workers with plain language education in biopsychosocial factors and what these might look like for them (either as a strength to leverage in recovery or as a risk they might need support to mitigate).
 - Seeking worker contributions for recovery and return to work ideas.
 - Transparent conversations about expectations and contextual limitations such as scheme policy or workplace accommodations..¹⁰⁷
- 7.77. From 7.96 I provide a practical example of the way in which the Queensland workers' compensation scheme, WorkCover Queensland, seeks to incorporate some of these principles.
- 7.78. Case managers should be empowered to provide proactive advice and support to injured workers to be part of their own recovery planning, rather than reactively accepting or denying requests for support..¹⁰⁸
- 7.79. The Recovery Blueprint project provides the following case study, which illustrates the difference in recovery outcomes between proactive ('risk factor identification applied') and reactive ('risk factor identification not applied') case management..¹⁰⁹

105 Consultation 2 (Roundtable with WorkSafe agents).

106 Consultation 2 (Roundtable with WorkSafe agents).

107 WorkSafe Queensland, 'Tailored Support - recovery your way' (Web Page, 9 September 2020)

<<https://www.worksafe.qld.gov.au/rehabilitation-and-return-to-work/recovering-from-injury-or-illness/working-together-to-support-recovery/tailored-support-recovery-your-way>>.

108 SuperFriend and Safe Work Australia, *Taking action: Action Area Two* (Guide, 2019) 10 ('Action Area Two').

109 Ross Iles et al, Insurance, Work and Health Group, Faculty of Medicine, Nursing and Health Sciences, *Monash University*, 'Risk Factor Identification for Delayed Return to Work Best Practice Statement' (Research Report, April 2018) 31.

Improving the experience of injured workers

SCENARIO
Jennifer, a 47 year old nurse injures her back at work and is told by her usual physiotherapist that she has a disc injury. Jennifer sees her GP and is given a certificate for a week off work and recommends further physiotherapy treatment.
RISK FACTOR IDENTIFICATION APPLIED
After gathering the information required to understand Jennifer's injury and her role at work, the case manager asks Jennifer to complete a psychosocial screening questionnaire to identify if there are other factors that may impact her ability to return to work. The case manager works through the Short Form Örebro Questionnaire with Jennifer and arrives at a high score of 53 out of a possible 100. Jennifer has said to the case manager that she is worried this will happen again at work, and the implications that might have for her job and her family. Based on the risks identified by the Short Form Örebro questionnaire and the conversations with Jennifer, after 3 weeks off work the case manager arranges a referral for psychological support. With ongoing psychological input alongside physiotherapy, a return to work plan is developed that aims for a partial return after 8 weeks' absence.
RISK FACTOR IDENTIFICATION NOT APPLIED
After gathering the information required to understand Jennifer's injury and her role at work, the case manager expects that Jennifer will return to work as indicated by the certificate of capacity. However, after that period a new certificate is issued for a further two weeks off work. When the third certificate is submitted the case manager contacts Jennifer and is concerned to hear that she reports the pain is not getting better. A conversation with the physiotherapist confirms that Jennifer's progress has been slow and that further treatment will focus on exercise-based therapy to strengthen in preparation for return to work. After 6 weeks of being absent from work, Jennifer is still not progressing so the case manager arranges a case conference with Jennifer, the physiotherapist and the GP, the result of which is a referral to a psychologist for help with recovery. After Jennifer's fourth appointment with the psychologist, and ten weeks after the injury, a return to work plan is developed that aims for partial return to work after 15 weeks' absence.
IMPACT OF RISK FACTOR IDENTIFICATION
Risk factor identification enabled proactive service delivery that ultimately reduced the length of time off work. The longer a complicating factor takes to become apparent to the case manager or treating practitioner involved in Jennifer's care, the longer process will take to address the condition.

7.80. An Australian study of worker experiences across workers' compensation jurisdictions found:

evidence that claimants' perceptions of the fairness of procedures used in social insurance and compensation claims decision making can influence health and work outcomes. Features of just procedures include that they are unbiased, accurate, consistent, and that the affected person is involved or has [a] 'voice' in decision making.¹¹⁰

7.81. From the experiences I have heard throughout the Review, many people do not feel that the scheme is helping Victorian injured workers to be a part of their own recovery solutions. The Review's expert panel considered that:

110 Collie et al (n 73) 8.

Improving the experience of injured workers

There has been a failure of workers' compensation systems and health systems to grapple with biopsychosocial factors.¹¹¹

7.82. A study commissioned by WorkSafe concluded that:

Health and recovery outcomes were influenced by workers' ability to understand medical information and who they perceived as being at fault for their injury.¹¹²

7.83. The study below outlines an approach to offering targeted support to injured workers.

WISE study

The Pain Management Research Institute tested the 'Work Injury Screening and Early Intervention (WISE)' protocol on a group of workers' compensation claimants in New South Wales between 2013 and 2015.¹¹³

Headed by a member of the Review's expert panel, Professor Michael Nicholas, the WISE study identified workers with soft tissue injuries who may be at risk of delayed recovery. Case managers administered a pain screening questionnaire to injured workers within one week of their injury. This questionnaire targets psychological risk factors.

Of the 580 injured workers screened, 25% were identified as having a high risk of delayed recovery. They were offered a targeted support protocol. The protocol required case managers to facilitate a combination of biopsychosocial interventions, including:

- whatever treatment the worker's doctor recommended;
- short term access to a psychologist within 2-3 weeks, directly responding to the risk areas identified in the screening;
- return to work planning with the workplace;
- specialist physiotherapist monitoring of physical treatment;
- regular psychologist liaison with the worker's workplace and doctor; and
- a second opinion from an independent occupational physician.

Of the workers who accepted the offer for additional biopsychosocial support 94% were back at work after three months. This compared with 81% of those who received standard care.¹¹⁴ The average time off work for the high risk supported group was half the duration of those who received standard care.¹¹⁵

The WISE study required case managers to be sufficiently skilled to administer the screening questionnaire and promptly coordinate and approve the study protocol. The study protocol in turn provided the case manager with the framework and permission to ensure qualitative

111 Consultation 17 (Expert session 1).

112 Leembruggen and Pejic, *Victorian Injured Worker Outcomes Study (VIWOS): Phases 1-3* (Summary Report, October 2018) 12.

113 Consultation 17 (Expert session 1).

114 Michael Nicholas, 'The Work Injury Screening and Early Intervention (WISE) Study' (Report, Australian Pain Society, 5 October 2016).

115 Nicholas et al, 'Implementation of Early Intervention Protocol in Australia for 'High Risk' Injured Workers is Associated with Fewer Lost Work Days Over 2 Years Than Usual (Stepped) Care' (2020) 30 *Journal of Occupational Rehabilitation* 93.

information from the screening directly influences the targeted multidisciplinary interventions. The case manager was empowered to approve prompt services by a combination of providers, concurrent with supporting return to work planning between the worker and employer.

This study illustrates the effectiveness of early identification of risk for delayed recovery combined with targeted holistic treatment to address identified risks.

Employer engagement

7.84. As noted above, early engagement with the employer by the claims manager was widely referred to as important in submissions to the Review.¹¹⁶ Its importance to the success of an injured worker's recovery is so widely recognised that the Safe Work Australia best practice framework dedicates one of its six 'Action Areas' to it.¹¹⁷

7.85. The framework summarises current best practice claims management which helps employers support injured workers to achieve the best possible outcome. Elements include:

- **Early support when the worker needs it**, including improving the employer's initial response to injury, encouraging supportive communication between the worker and employer, and identifying the most direct path back to work, either in the original, a modified, or a new job;
- Assisting the employer to draw on relevant guidelines to improve their organisational policies relating to injuries, claims and return to work, including the health benefits of good work;
- Ensuring the case manager is communicating with the most appropriate person at the employer to support the worker and their return to work;
- **Emphasising the ongoing importance of the role the employer plays in supporting the worker's recovery**, including resolving any workplace issues connected to the worker's injury, making reasonable adjustments and identifying suitable duties;
- Providing ongoing support to the worker and employer through any dispute processes to ensure they can remain focused on return to work; and

116 See, eg, Submissions DP1 (ACCS), DP10 (Ai Group), DP35 (IWSN), DP41 (MBV), DP42 (Occupational rehabilitation provider, name withheld), OP13 (VFF), OP16 (WorkSafe agent, name withheld).

117 SuperFriend and Safe Work Australia, 'Taking action' (n 98) 31-37. Similarly, Safe Work Australia has also allocated an Action Area for 'Supporting Employers' in the National Return to Work Strategy 2020-2030: Safe Work Australia, 'National Return to Work Strategy 2020-2030' (Report, 20 March 2020) 29-32.

- **Collaborating with all parties to facilitate evidence-based treatments,** including workplace-based or work-focused treatments relevant to the worker's needs.¹¹⁸

Continuous improvement through feedback

- 7.86. Empirical evidence aligns with information received in submissions: feedback from workers and employers should inform claims management operations.¹¹⁹
- 7.87. A continuous customer feedback cycle allows the customer to feel their voice has been heard and acknowledged. Ideally, feedback will lead to immediate change in an individual case and will lead to systemic change as part of a continuous improvement cycle.
- 7.88. Examples of such feedback mechanisms in practice include:
- the New Zealand Accident Compensation Corporation's (ACC) 'Heartbeat' and 'Customer Advisory Panels'¹²⁰; and
 - New South Wales' 'Customer Advocate';¹²¹ and
 - WorkSafeBC's 'Public hearings and consultations'.¹²²
- 7.89. Continuous improvement in workers' compensation schemes must also balance the needs of various parties in the scheme. Research points to the importance of performance evaluation which distinguishes between:
- claimant/patient outcomes;
 - insurer outcomes; and
 - employer outcomes.¹²³

Best practice complex claims management – lessons from interstate and overseas

- 7.90. Paragraph 16(a) of the Terms of Reference requires me to consider 'the experience of other compensation schemes...'. As noted in Chapter 1, I consulted

118 SuperFriend and Safe Work Australia, Taking action (n 98) 27–29.

119 See, eg, SuperFriend and Safe Work Australia, Action Area Two (n 108) 23; Submission DP55 (WorkSafe agent, name withheld); Consultation 25 (ACC NZ).

120 Consultation 25 (ACC NZ).

121 icare, 'Customer Advocate' (Web Page) <<https://www.icare.nsw.gov.au/about-us/customer-engagement/customer-advocate#gref>>.

122 WorkSafe BC, 'Current public hearings & consultations' (Web Page, 24 February 2021) <<https://www.worksafebc.com/en/law-policy/public-hearings-consultations/current-public-hearings-and-consultations>>.

123 SuperFriend and Safe Work Australia, Action Area Two (n 108) 28.

with senior officers from several other compensation schemes. In this section, I summarise what I learnt from five of them.

WorkCover Queensland

- 7.91. The workers' compensation system in Queensland is unique in Australia in that it has been a centrally funded and managed scheme since it was established early in the twentieth century.
- 7.92. Many submissions pointed to the Queensland scheme as one from which WorkSafe could learn a lot about best practice management of complex claims. I have concluded that, although there are differences between the two schemes, the claims management approach taken in Queensland shows promise as one that contains elements of better practice. I describe some of these elements below.

Continuity of claims management

- 7.93. To ensure continuity of claims management, WorkCover Queensland has various processes in place. These include an 'academy'—when a staff member gives notice that they are leaving, there is a pool of people who are already trained. Someone within the team receives initial training to ensure they can deal with phone queries. This helps minimise any gaps in claims management. The claim manager then has a three-month coaching plan.¹²⁴
- 7.94. WorkCover Queensland told me that its goal is to keep claim management with the same case manager for the duration of the claim. There is an initial decision about whether to accept the claim made within five to six days. Once accepted the claim is handed over to a claims manager for ongoing management.
- 7.95. WorkCover Queensland is currently assessing if there is a way to have mental injury claims managed by a single person for the duration of the claim. Where it is possible to identify and triage long-term complex claims, the aim is for the initial decision-maker to case manage the claim. This would reduce the need for the person to retell their story, which, as noted earlier, has been identified as adding to distress for an injured worker.¹²⁵

¹²⁴ Consultation 16 (OIR and WorkCover Queensland).

¹²⁵ Consultation 16 (OIR and WorkCover Queensland).

Person-centred approach—Information on website

- 7.96. In Chapter 6, I described the new claims management model developed from the 'Recovery Blueprint project'. It provides an example of Queensland's new approach to person-centred claims management.
- 7.97. WorkCover Queensland has also incorporated the new 'person-centred' claims approach onto its website. Its website describes requiring a 'team-effort'¹²⁶ from participants in the recovery planning process, including employers and providers, to ensure everyone's primary focus is the worker. Examples of behaviours to facilitate this include:
- making sure the worker has a chance to talk about their goals and ideas for recovery;
 - collaborating about alternatives with the worker when a suggestion may not be possible; and
 - personalising documents and correspondence.¹²⁷
- 7.98. The joint submission to the options paper made by members of the Review's expert panel identified the following features of the Queensland scheme as worthy of consideration by WorkSafe:

The Queensland scheme has a separate regulator to the insurer – an important component of the Queensland system.

Case management is addressed more holistically in the Queensland system. Case managers receive significantly higher levels of remuneration than in Victoria, annual turnover is about 10%, case managers receive significant training focused on soft skills. Staff have a notably lower number of cases to manage and less administrative burden.

Senior management has deep experience in workers compensation and case management.

There is a clear focus on evidence-based case management.¹²⁸

126 WorkCover Queensland, 'Getting back to work' (Web Page, 3 October 2020)

<<https://www.worksafe.qld.gov.au/resources/guides/getting-back-to-work>>.

127 WorkSafe Queensland, 'Tailored support - recovery your way' (Web Page) <<https://www.worksafe.qld.gov.au/rehabilitation-and-return-to-work/recovering-from-injury-or-illness/working-together-to-support-recovery/tailored-support-recovery-your-way>>.

128 Submission OP7 (Expert academic and medical professional group) 7.

- 7.99. The Recovery Blueprint project illustrates the importance of appropriate claims management protocols to improve outcomes for injured workers and the scheme. These best practice principles are described in the box below.

Recovery Blueprint Best Practice Principles

Recovery Blueprint describes evidence-based principles for best practice environments for return to work:

- The value of a 'case management' approach to claims management.
- The importance of timeliness.
- The need for clear and open communication at all stages of a claim.
- Continuous improvement (including quality assurance, evaluation, learning from mistakes).
- Effective use of data analytics and automation.
- Adopt a biopsychosocial (rather than medicalised) approach to care.
- Follow evidence-based health principles.
- Health literate case managers..¹²⁹

Transport Accident Commission (TAC)

- 7.100. Another example of better practice claims management explored by the Review is the Transport Accident Commission ('TAC') approach. In Chapter 6, I described key features of TAC's triage approach. Below I describe the TAC's 'supported recovery' approach to claims management that it uses to support clients with complex needs. I also describe elements of the TAC's approach which demonstrate a 'client-centric' culture.

Relationship manager for clients with complex needs

- 7.101. TAC describes the 'supported recovery' stream as focusing on 'client choice, participation, restoration and wellbeing', thereby aiming to reduce reliance on the health, welfare, social services and justice systems and improve social connections..¹³⁰ There are about 15 000 clients in the supported recovery stream.
- 7.102. TAC stated that 'supported recovery clients', remain 'supported recovery clients' throughout the life of their claim. A TAC 'Relationship Manager' owns the relationship with the client and retains responsibility for the management of their

¹²⁹ Iles et al (n 109) 37.

¹³⁰ Transport Accident Commission, 'Shifting the focus to client outcomes and social impacts' (Web Page, 18 April 2018): <<https://www.tac.vic.gov.au/providers/resources/news/shifting-the-focus-to-client-outcomes-and-social-impacts>>.

client's claim until they no longer need that intensity of support. When the client's needs are low, the claim will move into an 'active maintenance' team within the supported recovery stream. This 'single point of contact is powerful for [TAC] clients'.¹³¹ There are approximately 80 relationship managers and their role is described below.

TAC—Relationship managers

TAC's position description for a 'Relationship Manager' focuses explicitly on the injured person. It describes the job purpose as to 'build trusting relationships with clients' and to engage and support clients to get their 'life back on track', whilst focusing 'on the person and plan with the client, not the injury'. The first key accountability listed is to 'assess client needs through meaningful and authentic conversations to identify their physical, emotional; and psychological and social needs and ongoing support'. The position specifically seeks candidates with an allied health or equivalent experience background.¹³²

A Relationship Manager provides proactive planning with the client and their support network. Clients are offered internal or external services to achieve their recovery goals, including those in their personal life such as family support or transport. A Relationship Manager speaks with all their clients and works with them until they do not need as much assistance.¹³³

The Relationship Manager may suggest that the client work with a TAC 'Work Specialist' or 'Wellbeing Specialist' to achieve their goals. These are new specialist roles designed to work with clients and their networks alongside the Relationship Manager. The relationship manager coordinates with these specialist roles to bring them in to work with a client and others such as treating practitioners as needed to help get the client's life back on track through early intervention.¹³⁴

7.103. TAC described the importance of its staff retaining their identity as clinical specialists, rather than claim administrators: 'The last thing TAC wants is to burn people out or turn them into administrators—holding the power, turning cold'.¹³⁵

Client-centric culture

7.104. TAC advised me that the culture and focus of the scheme has changed over time. TAC focused on scheme sustainability for its first ten years. This was important because the two predecessors to TAC—the State Insurance Board and the Motor

131 Consultation 38 (TAC session 2).

132 Transport Accident Commission, 'Relationship Manager' (Position description, 10 November 2020).

133 Consultation 38 (TAC session 2).

134 Consultation 38 (TAC session 2).

135 Consultation 38 (TAC session 2).

Accident Board - 'suffered significant financial challenges'..¹³⁶ In its second ten years, TAC focused on the experience of the customer. TAC advised me that its current approach is that 'if the outcome is right, the finances and customer experience follow'..¹³⁷

- 7.105. TAC emphasises a culture of genuine care for clients. TAC told me that the ultimate goal is to get the injured person back to work or other activities..¹³⁸ To achieve this it expects that their staff put themselves in the shoes of the client..¹³⁹
- 7.106. TAC uses its website to describe its vision, mission and values. TAC describes itself as committed to delivering benefits under the scheme in a 'caring, efficient and financially responsible way'..¹⁴⁰
- 7.107. To further illustrate their commitment to this culture, TAC has a service charter. The service charter can be found on TAC's website. It includes commitments to respond to queries promptly, explain the reason for decisions to refuse treatment or services as well as review and appeal rights..¹⁴¹ The service charter section uses plain English to describe what TAC expects of its clients as well as the standard of service that its clients can expect from TAC.
- 7.108. In consultation with the TAC, I observed that this 'client-centric' culture appears genuine, deeply-held, and embedded within the organisation as a 'way of working'. I was struck by the obvious enthusiasm of the workers for TAC's mission.
- 7.109. Multi-disciplinary members of the supported recovery team unanimously described a clarity of purpose which aligns with their personal and professional values—'to take action and support clients'..¹⁴² They said that this is a significant change from their previous experiences in the workers' compensation scheme, which were characterised by:
- the inability to address non-accident related issues;

136 Ellis and Gifford, 'The TAC's Longitudinal Client Outcomes Study' (Conference Paper, Actuaries Institute: Injury Schemes Seminar, 8-10 November 2015) 4.

137 Consultation 13 (TAC session 1).

138 Consultation 13 (TAC session 1).

139 Consultation 13 (TAC session 1).

140 Transport Accident Commission, 'What we do' (Web Page) <<https://www.tac.vic.gov.au/about-the-tac/our-organisation/what-we-do>>.

141 Transport Accident Commission, 'Service Charter' (Web Page) <<https://www.tac.vic.gov.au/about-the-tac/information-and-privacy/service-charter>>.

142 Consultation 38 (TAC session 2).

Improving the experience of injured workers

- focus on agent requirements rather than worker needs; and
- witnessing workers being ‘chewed up and spat out’.¹⁴³

7.110. This perception of TAC was shared by many of those who made submissions to this Review. I was told that there is a stark contrast between the culture of TAC and the culture of the Victorian workers' compensation agent model. Professor Alex Collie, who has experience of both schemes, told me:

There is a combination of features of TAC claims management that result in better practice including personnel, training, culture, less staff turnover. TAC has a very different culture to those present in the agent-model; there is an absence of commercial/ financial incentive—it is not profit-making.¹⁴⁴

7.111. Mr Alan Clayton stated that 'there is an ethos and culture in TAC that revolves around the public good that isn't seen elsewhere'.¹⁴⁵

7.112. One of the members of the Review's expert panel, Ms Janet Dore, said:

The key difference with the TAC and the way it manages claims is the culture of believing the injured person. It doesn't shirk from litigation, but it is supportive of the client.¹⁴⁶

7.113. The Law Institute of Victoria submitted that, based on the experience of its members who deal with both WorkSafe and the TAC:

...there are major cultural differences between the two schemes. The TAC scheme does not adopt a 'one size fits all' approach to case management. Efforts are made to tailor management of claims to the specific needs of each individual claimant.¹⁴⁷

7.114. The Law Institute of Victoria submitted that TAC's current processes for handling complex cases appear to be efficient and effective.¹⁴⁸

7.115. The Police Association of Victoria submitted that:

There are a number of aspects of the TAC model that we believe would be of benefit to the current WorkCover model. Importantly, there is a clear focus on benefit delivery over scheme viability in the practices of the TAC.¹⁴⁹

143 Consultation 38 (TAC session 2).

144 Consultation 17 (Expert session 1).

145 Consultation 17 (Expert session 1).

146 Consultation 19 (Expert session 2).

147 Submission DP39 (LIV) 8.

148 Submission DP39 (LIV); see also Submission DP45 (Slater and Gordon Lawyers).

149 Submission DP48 (TPAV) 9.

7.116. The Victorian Trades Hall Council suggested that TAC, as a ‘social insurer’, provides a good model and that workers’ compensation claims should be managed in a similar way:

The Transport Accident Commission is an example of a model that centres the needs of the injured person, through a public case management system. It is a Victorian Government owned organisation that was established to pay for treatments and benefits for people injured in transport accidents, promote road safety and help Victorians get their lives back on track.¹⁵⁰

The State of Washington, USA

7.117. Key features of the State of Washington’s workers’ compensation scheme and the Department of Labor and Industries’ claims management model are outlined in Appendix E.

7.118. Washington promotes a localised health-led response to injured workers in its workers’ compensation system, as demonstrated through its approach to claims processing and management, and the initiatives described below.

7.119. While there are parallels that can be drawn between the Washington and Victorian systems as both are centrally funded schemes, Washington’s health-focused approach can be contrasted to the insurance-led response in Victoria.

7.120. The sections below describe elements of Washington’s scheme that incorporate better or best practice. I examine:

- the apprenticeship approach to recruiting and developing claims management capability (see box below);
- Centers for Occupational Health and Education (widely known as COHEs); and
- a new occupational rehabilitation model.

7.121. Washington uses an apprenticeship approach to recruit and train staff for case management. It is described in the box below.

State of Washington, USA—Recruitment and claims management capability—an apprenticeship approach¹⁵¹

The Department of Labor and Industries, which runs the State of Washington’s workers’ compensation scheme, takes a pragmatic approach to recruiting staff with appropriate case management capability. It recruits for aptitude and then trains staff in the required technical

150 Consultation 3 (VTHC).

151 Consultation 23 (Dept L&I, Washington).

skills. The Department does not require college degrees for case manager roles. Instead, it has established a formal apprenticeship program that runs for 22 months, to ensure case managers have the requisite skills and aptitudes for the role.

The Department focuses on developing the ‘soft skills’ of its staff. Staff advised that this approach can be distinguished from the approach taken to recruitment and training at private insurers: ‘the insurance industry generally doesn’t focus enough on the soft skills of staff’.

Apprentice case managers shadow call centre staff and participate in video simulations to preview the types of situations they may have to deal with in a case manager role. The aim is to ensure that apprentice case managers are very clear about the nature of the work and capability required. They will self-select out of the apprenticeship process if they realise they are not a good fit for the role.

Washington stated that they have a 66% completion rate for the apprenticeship program. Those who complete it typically only leave for a promotion or to obtain a higher salary.

This practical approach to recruitment and capability training is relevant for Victoria in responding to apparent difficulties in attracting a suitable case management workforce.

Coordinating health care—Centers for Occupational Health and Education (COHEs)

7.122. COHEs are partnerships between the Department of Labor and Industries and private health entities which aim to:

- improve medical and workforce retention outcomes for workers with compensable conditions by engaging with providers, employers and labour organisations;¹⁵²
- deliver evidenced-based healthcare and other services on a case-by-case basis, to ensure that each claimant receives services in a timely manner, preventing avoidable long-term work disability;¹⁵³ and
- educate medical providers in occupational health best practices, and pilot potential approaches that can improve quality of outcomes for injured workers.

7.123. COHEs perform health care coordination for workers, but do not perform return to work interventions or claims management.¹⁵⁴

7.124. The Department of Labor and Industries contracts with the private health entity, paying them for health care co-ordination on a fee-for-service schedule. It also

152 David Stapleton and Jennifer Christian, *Helping Workers Who Develop Medical Problems Stay Employed: Expanding Washington’s COHE Program Beyond Workers’ Compensation – Final Report* (Report, September 2016) 5 (‘COHE Expansion Report’).

153 COHE Expansion Report (n 152) 6.

154 Consultation 23 (Dept L&I, Washington).

makes an additional fixed administrative payment per claim to cover other costs such as provider education.¹⁵⁵

7.125. To obtain services through a COHE, a worker must initiate their claim with a COHE-affiliated provider. In June 2020, 57.5% of claims in Washington were initiated by a COHE-affiliated health provider.¹⁵⁶

7.126. Incentives for medical service providers to participate as COHEs are both financial and non-financial. For example, COHEs offer physicians:

- special billing codes and rates;
- special designation through the Department's 'find a doctor' application;
- help from COHEs 'best practice trainers'; and
- access to health services coordinators.

7.127. A 2016 report prepared by Mathematica Policy Research states that COHEs have:

- demonstrated improved functional outcomes and increased workforce retention among workers' compensation claimants;¹⁵⁷ and
- substantially reduced lost work time and long-term disability for workers' compensation claimants while lowering workers' compensation expenditures.¹⁵⁸

7.128. The report noted that the Department's actuaries consistently find that the lifetime costs of workers' compensation claims for workers with COHE-affiliated providers are lower than those for other workers.¹⁵⁹ It considered COHEs to be a 'particularly successful' initiative.¹⁶⁰ The following box provides further information on the important role of Health Service Coordinators within COHEs.

COHE best practice & Health Service Coordinators

Health Service Coordinators provide services to individual workers and educational support for providers and other stakeholders. They work alongside an assigned group of COHE-affiliated providers, co-ordinating care and return to work activities for injured workers, including:

- ensuring forms are received and complete;

155 COHE Expansion Report (n 152) 19.

156 State of Washington, Department of Labor & Industries, 'Workers' Compensation Advisory Committee' (Presentation, 22 June 2020).

157 COHE Expansion Report (n 152) 1.

158 COHE Expansion Report (n 152) 1.

159 COHE Expansion Report (n 152) 1.

160 WorkComp Strategies LLC, *Washington Department of Labor and Industries Claims Management Performance Audit* (Report, June 2015) ('LLC Performance Audit 2015') ch 1, 17.

- contacting injured workers, employers, providers, Department staff and other stakeholders to help with treatment and return to work processes; and
- identifying barriers to recovery and resources needed to resolve them.

Providers within COHEs must adopt occupational health and opioid best practices.

Requirements include:

- submitting a timely and complete Report of Accident form to the Department to ensure claims are opened quickly;
- submitting an Activity Prescription form to the Department after the first office visit, or when patient restrictions change, so that the worker, employer and case manager understand the treatment plan and recovery expectations;
- discussing return to work options with the employer when the worker has restrictions;
- identifying barriers to recovery and solutions to those barriers with each worker; and
- prescribing opioids appropriately.

The Vocational Recovery Project

- 7.129. The Department of Labor and Industries explained that the present culture of the Washington scheme has shifted from being a 'system-centric assessment based approach' to a 'vocational recovery approach'. Previously the scheme focused on reducing costs through 'shutting down' claims, whereas now it focuses on work disability prevention through vocational recovery services.¹⁶¹
- 7.130. The shift to a 'vocational recovery approach' has improved outcomes for workers and has resulted in reductions in claims liabilities. The Department of Labor and Industries highlighted the importance of leadership to support cultural change across the industry and to encourage a focus on workers' welfare and needs.¹⁶²
- 7.131. The Vocational Recovery Project was launched in 2016 with a pilot group of 65 case managers and vocational rehabilitation counsellors from the private sector. It aims to engage all parties in preventing work disability by improving return to work outcomes.¹⁶³ It looks for indications that a worker may have barriers to returning to work, and if barriers are present, refers the worker to a private vocational recovery counsellor. The project's service principles and a quality assurance model reinforce a person-centred approach to vocational services.

161 Consultation 23 (Dept L&I, Washington).

162 Consultation 23 (Dept L&I, Washington).

163 Singlehanded Consulting, 'Getting People Back to Work' (Web Page, 29 June 2018) <<https://www.shcvoc.com/post/washington-s-vocational-recovery-project-gains-national-attention>>.

Improving the experience of injured workers

7.132. Data from 2014 to 2019 indicates that the Vocational Recovery Project has significantly increased return to work outcomes for participants. For example, return to work outcomes increased from 11% to 32%.¹⁶⁴

Accident Compensation Corporation (ACC)—New Zealand

7.133. Key features of the New Zealand accident compensation scheme's claim segmentation approach are outlined in Chapter 6 and Appendix E.

7.134. The sections below describe elements of the ACC's scheme that show promise as providing elements of better or best practice claims management. In particular, the ACC:

- promotes a person-centred culture; and
- seeks to incorporate client feedback to ensure continuous improvement.

Person-centred culture—'Welcome conversations'

7.135. The ACC uses 'welcome conversations' between frontline staff and clients when a client is first interacting with the ACC. Welcome conversations help the ACC identify the right level of support for the client. The ACC said that:

The Welcome Conversation is a series of questions/prompts that staff follow to ensure clients have a consistent onboarding experience as we collect relevant information. The questions can be followed in a natural style that fit into a client-driven conversation, as opposed to a script to read verbatim.

Conversations cover seven areas: introduction; treatment; support; weekly compensation; work and work planning; client goals, and close out.¹⁶⁵

7.136. The ACC's 'Heartbeat' program of responding to feedback is described below.

164 Washington Joint Legislative Audit and Review Committee, *Follow-Up on Workers' Compensation Claim Management for State Funded Claims* (Preliminary Report, 2021) 3.

165 Email from [REDACTED] - ACC NZ to Kirsten McKillop, Director – Independent Agent Review, 5 March 2021; Consultation 25 (ACC NZ).

ACC—Continuous improvement in case management 'Heartbeat'¹⁶⁶

The ACC obtains real time feedback from its clients through the 'Heartbeat' program. The Heartbeat technology sends emails or text messages to claimants and providers, seeking their feedback at important points in the claimant's experience.

Heartbeat provides for immediate action (short-loop) to ensure prompt responses by ACC staff to any issues identified by clients. It can also provide positive feedback for staff members. The 'short loop' program is a component of the Heartbeat platform that allows the ACC to build rules that trigger action and allocate it to a specific employee for action. For example, when a customer expresses dissatisfaction.

Since Heartbeat was launched in June 2018, the ACC has received 61,251 customer survey responses and actioned 11,029 feedback cases within the 'short loop'.

Case follow-ups are shared with the employee's team leader to form part of their usual coaching. Quality checks are also made on random Heartbeat cases to ensure follow-ups are happening as intended.

Information is also collected to identify systemic issues for change and successes (long-loop). The technology allows the ACC to collate survey responses to monitor trends, themes and systemic issues affecting customer experience. These are shared with the wider business to continuously improve the customer experience.

National Disability Insurance Scheme

- 7.137. A number of submissions referred to the National Disability Insurance Scheme (NDIS) as having features that could be incorporated into a complex claims management system administered in future by WorkSafe. The positive features of the scheme include the choice and control that it gives people with disabilities, its human rights foundations, and its individualised approach to the provision of care and support.
- 7.138. However, submissions also warned that there were a number of problems in the implementation of the scheme that 'WorkCover would be wise to acknowledge and avoid'.¹⁶⁷ These problems include delays in processing eligibility, a lack of expertise on the part of care planners, and a lack of robust review mechanisms. According to the Victorian Trades Hall Council, the problems are compounded by a lack of funding.

¹⁶⁶ Email from ██████████, 5 March 2021 (n 165); Consultation 25 (ACC NZ); Controller and Auditor-General New Zealand, *Accident Compensation Corporation Case Management: Progress on Recommendations Made in 2014* (Report, House of Representatives, November 2020) 20.

¹⁶⁷ Submission DP54 (VTHC) 24.

7.139. The Law Institute of Victoria submitted that the NDIS is worthy of consideration 'but only from a theoretical perspective, not as a model of good practice'.¹⁶⁸ It drew attention to the 'participant-centred approach' of the scheme but also referred to significant delays associated with eligibility decisions and the finalisation of plans, inadequate review mechanisms and a lack of expertise.¹⁶⁹

Recent WorkSafe and agent initiatives to improve their management of complex claims

7.140. WorkSafe and the agents advised me that in recent years they have implemented a range of initiatives that target potential complexity and biopsychosocial risk factors.¹⁷⁰ This includes programs that recognise the role of biopsychosocial factors in claims management. A number of these initiatives have responded to the Ombudsman's reports.

7.141. WorkSafe and its agents provided me with numerous examples of pilots and other programs. Over twenty trials and pilot programs were described to me and yet, as can be seen throughout this report, these interventions are not resulting in positive experiences for workers who have contacted the Review.

7.142. One of the five current WorkSafe agents stated that 'many policies and procedures have been quite rigid in their implementation, restricting the ability for claims staff to be innovative and person-centred in their approach'.¹⁷¹

7.143. Another agent said there has been a recent shift to allow agents to provide greater focus on recovery and to support workers. The agent stated that it has a focus on the management of complex claims and gave several examples of initiatives it had worked on with WorkSafe.¹⁷²

7.144. Other agents also provided descriptions of their programs and approaches to improving complex claims management.

7.145. In the below sections, I describe some of the examples provided to me. Where relevant I identify those that I consider show some promise in providing better practice for the management of complex claims. Generally, these are the ones

168 Submission DP39 (LIV) 8.

169 Submission DP39 (LIV) 8-9.

170 Consultation 22 (WorkSafe Victoria session 2).

171 Submission DP55 (WorkSafe agent, name withheld) 9.

172 Submission DP55 (WorkSafe agent, name withheld).

that attempt to incorporate biopsychosocial factors, provide a more person-centric approach, and provide needs-based support.

Clinical framework and Clinical Panel

- 7.146. WorkSafe’s clinical framework, developed in conjunction with the TAC, sets out five guiding principles for the delivery of health services within the scheme. Principle Two encourages healthcare providers to adopt a biopsychosocial approach to injury management which has been shown to be ‘effective in improving function, facilitating recovery and maximising independence’.¹⁷³
- 7.147. The clinical framework is nationally endorsed by numerous Australian compensation schemes including TAC,¹⁷⁴ the national Comcare scheme,¹⁷⁵ State Insurance Regulatory Authority (SIRA, New South Wales),¹⁷⁶ and WorkCover WA.¹⁷⁷ The framework provides guidance to treating providers on the delivery of healthcare services. The Clinical Panel helps providers to understand the framework's principles, and to make sure that services are aligned with policy.¹⁷⁸
- 7.148. The Clinical Panel is a multidisciplinary resource for WorkSafe and its agents, comprised of 93 medical and allied health practitioners.¹⁷⁹ The Clinical Panel is intended to provide a coordinated care approach through collaboration with agents and healthcare providers to maximise health outcomes for workers. The practitioners provide input to scheme policies and initiatives. They also liaise with treating practitioners and case managers about individual workers.¹⁸⁰
- 7.149. In a multi-disciplinary approach to claims, the relationships between practitioners, insurance agencies and injured workers can either promote or obstruct the workers' recovery or return to work. Evidence shows that this is true

173 WorkSafe Victoria and Transport Accident Commission, *Clinical Framework for the Delivery of Health Services* (Guide, 2012) 6.

174 Transport Accident Commission, 'Clinical Framework' (Web Page, June 2012) <<https://www.tac.vic.gov.au/providers/working-with-the-tac/clinical-framework/collaboration-and-support>>.

175 Comcare, 'Allied health professionals' (Web Page, 14 December 2020) <<https://www.comcare.gov.au/service-providers/medical-allied-health/allied-health>>.

176 State Insurance Regulatory Authority, 'Clinical Framework' (Web page) <<https://www.sira.nsw.gov.au/for-service-providers/treatment-advice-centre/clinical-framework>>.

177 WorkCover WA, 'Clinical Framework' (Web page, 28 Jan 2016) <<https://www.workcover.wa.gov.au/health-providers/clinical-framework/>>.

178 WorkSafe Victoria, 'Clinical Panel Register Information Form' (Form, 1 July 2019) 1

<<https://content.api.worksafe.vic.gov.au/sites/default/files/2019-07/ISBN-Clinical-panel-registration-information-2019-07-01.pdf>>.

179 Email from ██████████ to Kirsten McKillop, Director – Independent Agent Review, 23 March 2021.

180 WorkSafe Victoria, 'Clinical Panel' (Web Page, 1 July 2019) <<https://www.worksafe.vic.gov.au/clinical-panel>>.

whether multi-disciplinary resources are centralised within the insurer or located across multiple organisations.¹⁸¹

- 7.150. A recent review of Clinical Panel models found good evidence to support the use of a coordinated care approach to provide better claims management. However, it noted qualitative client outcomes relating to panel services were not measured.¹⁸²

Mobile case management

- 7.151. 'Mobile case managers' were introduced by WorkSafe to provide a more personalised service to injured workers early in their claim.¹⁸³ Mobile case managers travel to conduct face to face visits with workers and employers at workplaces, doctors' surgeries, or other agreed locations.
- 7.152. Mobile case managers were first piloted in 2016 and then embedded as a case management model across agents in 2017-18.¹⁸⁴ WorkSafe added mobile case management delivery to agent financial performance incentives (Annual Performance Adjustment) measures in 2017-18.¹⁸⁵
- 7.153. WorkSafe described variability in the implementation of mobile case management across agents:
- Each agent has its own model that has been designed around the needs of its portfolio (of employers and injured workers), some focus predominantly on physical injuries and others on mental injuries. Each model is subject to close oversight by WorkSafe.¹⁸⁶
- 7.154. Mobile case management provides face-to-face support to employers, workers and treating health providers. The approach is designed to help identify barriers and opportunities for workers to achieve a safe and sustainable return to work. It seeks to improve transparency and trust between parties, expedite recovery and

181 Kilgour et al, 'Healing or Harming? Healthcare provider interactions with injured workers and insurers in workers' compensation systems' (2014) 25(1) *Journal of Occupational Rehabilitation* 4.

182 Transport Accident Commission, *Health, Disability & Compensation Research: Strategic Research Investment Road Map 2019/22 and Annual Plan 2019/2020* (Report, 2020) 26 <https://www.tac.vic.gov.au/__data/assets/pdf_file/0019/412273/Strategic-Research-Investment-Road-Map-2019-2022-and-Annual-Plan-2019-2020.pdf>.

183 I note that the South Australian Return to Work Corporation has recently introduced a similar program - see Return to Work Corporation (SA), *Annual Report 2020*, 20.

184 WorkSafe Victoria, *Monitoring and Oversight Committee Report* (Report, August 2020) 46 ('WorkSafe MOC Report').

185 WorkSafe Victoria, *Annual Report 2016/17* (Report, 2017) 119. Annual Performance Adjustments are discussed in Chapter 4.

186 Email from [REDACTED] to Kirsten McKillop, Director – Independent Agent Review, 23 March 2021.

- reduce administrative burden. An example of this is the ability for case managers to approve some treatments during the face-to-face meeting.¹⁸⁷
- 7.155. An agent which uses the model interstate submitted that it 'empowers mobile case managers to make on-the-spot treatment decisions, helping workers recover and get back to work sooner'..¹⁸⁸
- 7.156. However, an occupational rehabilitation provider stated that the mobile case management model is only appropriate for less complex cases. The provider noted that most mobile case managers do not have an allied health background, which was considered important for early identification of complex claims..¹⁸⁹
- 7.157. Mobile case management was formally evaluated by the Institute for Safety, Compensation and Recovery Research in 2018..¹⁹⁰ The evaluation found that all WorkSafe agents used similar approaches to mobile case management. It also found that workers unfamiliar with the claim process found the face-to-face support beneficial.
- 7.158. However, the evaluation found that common claims management issues remained present, including:
- case manager's lack of understanding of the worker's job or industry;
 - case manager turnover; and
 - delays in case managers being able to approve some treatments or make decisions..¹⁹¹
- 7.159. The evaluation also suggested improvements to the service, such as:
- including goals that consider recovery and quality of life outcomes;
 - providing workers with ongoing support for recovery (not just return to work);
 - enabling managers to make more on the spot treatment approvals; and
 - matching the numbers of manager visits to complexity or having one case manager retained throughout the claim process..¹⁹²
- 7.160. On balance, mobile case management appears to have positive features with the potential for a more personalised, tailored service. I consider that if mobile case

187 WorkSafe MOC Report (n 184) 47.

188 Submission DP55 (WorkSafe agent, name withheld) 10.

189 Submission DP42 (Occupational rehabilitation provider, name withheld).

190 Moo et al, *Mobile case management: Evaluation of WorkSafe Victoria's Mobile Case Management Trial* (Report, September 2018).

191 Moo et al (n 190) 6.

192 Moo et al (n 190) 46.

management is used in the management of complex claims in future, the case managers would need to have the appropriate skills and policy framework to support recovery. Case managers would also need to be able to draw in multidisciplinary specialists as required.

Recovery support services

- 7.161. Following Covid 19 'lockdown' restrictions in March 2020, WorkSafe identified a need for a service to support workers unable to work because of the restrictions. WorkSafe collaborated with rehabilitation providers to develop the Recovery Support Service which commenced operation in April 2020.¹⁹³
- 7.162. The Recovery Support Service provides flexible support and care coordination to help workers build toward their individual wellbeing. In contrast, traditional WorkSafe rehabilitation services focus on return to work, rather than individual wellbeing. I heard in submissions and consultation with the TAC that effective management of claims needs to be more holistic and place a focus on areas beyond just return to work.¹⁹⁴ This suggests that the principles of the Recovery Support Service and shift in focus to a more holistic approach is positive. However, it has not yet been evaluated. WorkSafe will evaluate this service in 2021.¹⁹⁵

Recovery Model Office pilot

- 7.163. As described in Chapter 6, the Recovery Model Office (RMO) tests a new triage model. The new model segments injured workers' claims into three streams based on the worker's perceived level of need. This contrasts with the current approach, also described in Chapter 6, which segments claims based on the duration of the claim. Each stream is intended to offer progressively greater degrees of claims management intervention.
- **Guided**—timely full recovery expected, little to no time off work, able to self-navigate.
 - **Supported**—complex or multiple injuries, barriers to recovery, support required.

193 WorkSafe Victoria, 'Recovery and Return to Work Program Update - formerly Back on Track' (Presentation, December 2020) 12.

194 See, eg, Submissions DP5 (Appropriate Measures), DP6 (RACP), DP11 (ALA), DP14 (APS), DP24 (Wyatt et al), DP36 (IWHG Monash), DP43 (RACGP); Consultation 38 (TAC session 2).

195 WorkSafe Victoria, 'Recovery and Return to Work Program Update - formerly Back on Track' (Presentation, December 2020) 12.

Improving the experience of injured workers

- **Assisted**—severe injury/ies, significant recovery barriers, long-term effects and services required, high need for support..¹⁹⁶

7.164. The RMO claims management activity focuses on the 'guided' and 'supported' streams. Gallagher Bassett, which is partnering with WorkSafe in this initiative, described the RMO as aiming 'to provide a different claims management service offering based on need and claim complexity'..¹⁹⁷ The different services offered respond to the needs identified during triage. Each stream requires different claims management skills to deliver individualised support to injured workers. Additional needs may be identified as part of ongoing risk identification.

7.165. Gallagher Bassett described the different levels of intervention as follows:

- **Guided stream**—where claims are managed in a pool approach by case managers with lower capability requirements. Workers with claims in this stream will generally be expected to self-serve via pre-approved services, requiring minimal or reactive contact from case managers.
- **Supported stream**—where services provide a dedicated claims specialist (*Recovery Manager*), case managers with a high skill level. Recovery Managers will deliver face-to-face services to workers or employers as required, using the principles of person-centred case management. The recovery manager works with all parties to develop individualised recovery plans..¹⁹⁸

7.166. The RMO also uses WorkSafe's clinical panel to provide multidisciplinary advice and guidance to case managers and recovery managers..¹⁹⁹

7.167. [REDACTED]

[REDACTED]

²⁰⁰

196 WorkSafe Victoria, 'Independent Reviewer Options Analysis' (Presentation, 4 March 2021) 2; Consultation 22 (WorkSafe Victoria session 2).

197 Submission DP27 (Gallagher Bassett) 16.

198 Submission DP27 (Gallagher Bassett); Consultation 22 (WorkSafe Victoria session 2).

199 Consultation 22 (WorkSafe Victoria session 2).

200 [REDACTED]

Table 5: [REDACTED]

[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

7.168. I note that in consultation with other compensation schemes I have been told that caseloads are not truly indicative of optimal capacity for service delivery. Because the needs and preferences of individual workers vary, caseloads are said to be a 'crude tool' for assessing resourcing needs.²⁰¹

7.169. WorkSafe’s written submission to me stated that ‘preliminary (pilot) evaluation results are encouraging, suggesting improved rates of return to work, reduced reliance on assessments by IMEs and an improved experience for injured workers’.²⁰² However, the RMO pilot has not been designed for expansion to scale. It is therefore unclear what WorkSafe intend to do with these promising observations. This is disappointing as the pilot seems to have good features.

Other recent programs

7.170. In its written submission responding to the discussion paper, WorkSafe noted recent initiatives that it considers respond more appropriately to workers with claims that have early features associated with complexity.²⁰³

7.171. Table 6 sets out WorkSafe's description of four of these initiatives.

Table 6: Examples of early complexity claim initiatives²⁰⁴

Introduced	Initiative	Summary
2019-20	Capacity Support Service / Back on Track / Recovery and RTW Support (pilot name has changed over time)	WorkSafe identifies potential workers with complex needs, up to one year after injury. A support team is assembled, including representatives from the agent, clinical panel, return to work inspectorate and an occupational rehabilitation provider. This team works with the worker,

201 See, eg, Consultations 38 (TAC session 2), 25 (ACC NZ), 23 (Dept L&I, Washington).

202 Submission DP57 (WorkSafe) 6.

203 Submission DP57 (WorkSafe).

204 WorkSafe MOC Report (n 184).

Improving the experience of injured workers

Introduced	Initiative	Summary
		<p>doctors and employer to coordinate a tailored recovery plan.</p> <p>Over 1200 multidisciplinary conferences have been held between the agent, WorkSafe's Clinical Panel and in some cases the RTW Inspectorate or rehabilitation provider. WorkSafe advised that this resulted in increased capacity in about 20% of workers.²⁰⁵</p> <p>WorkSafe told the Review that 'the vast majority (in excess of 90%)' of the workers selected for this pilot would align with those workers selected for the RMO's 'Supported segment'.²⁰⁶</p>
2019-20	Facilitated Discussion	Facilitated discussion services are provided by an accredited mediator. The aim is to address any workplace interpersonal conflict that is affecting return to work.
2019-20	Secondary mental injury	<p>Data from pharmaceutical accounts and 'text tagging' is used to identify workers who may be at risk of secondary mental injury. Text tagging is a form of data analytics, where recorded data, such as claims notes or account information, is mined for key words. For example, to perform text tagging for psychological conditions, WorkSafe's data analysts run reports looking for words relating to psychological conditions or treatment in WorkSafe's electronic claims management system.</p> <p>The aim is to identify injured workers who are at risk of a mental injury early to allow for timely intervention.</p>
2019-20	Worker retraining	Promotes earlier access to vocational retraining

7.172. The description of these programs suggests they aim to provide for earlier more needs-based intervention. On this basis, they appear to show promise as incorporating elements of better practice. However, beyond the advice from WorkSafe that the 'Capacity Support Service / Back on Track / Recovery and RTW Support' results in increased capacity in about 20% of workers, I lack the evidence to reach any firm conclusions about their effectiveness.

²⁰⁵ WorkSafe Victoria, 'Recovery and Return to Work Program Update - formerly Back on Track' (Presentation, December 2020) 9.

²⁰⁶ Email from [REDACTED] to Kirsten McKillop, Director – Independent Agent Review, 23 March 2021.

7.173. The positive features of these should be incorporated into the new complex claims management unit, but only after appropriate evaluation.

Longer term complexity

7.174. For those workers whose claims progress into the 130 weeks + segment (long-term claims), WorkSafe’s claims manual states that the case management strategy must be reviewed ‘at least every 26-39 weeks... (or) when there is a significant event in the life of a claim’. The case management strategy ‘needs to be continually reviewed and modified to ensure the worker is receiving the correct entitlements, including treatment and services appropriate to their injury circumstances and beneficial for their return to work’.²⁰⁷

7.175. In response to the Ombudsman’s 2016 report, WorkSafe performed a ‘health check’ of long-term claims in 2017-18. WorkSafe concluded that:

- current claims management methods were no longer able to improve outcomes for long term injured workers; and
- a new approach was needed to meet injured workers’ individual needs.²⁰⁸

7.176. Since the Victorian Ombudsman's 2016 report, WorkSafe has introduced a range of initiatives, seeking to address individual needs and complexity for workers with longer term claims.²⁰⁹ Some of these initiatives are described in table 7.

Table 7: Initiatives for longer-term complex claims²¹⁰

Introduced	Initiative	Summary
2018-19	Transition Support Services	This service provides planning advice to workers for reduction or cessation of their weekly benefits. Advice might include how to access community services or commonwealth supports.
2018-19	Recovery Assistance Program	This connects long-term injured worker claims (>4 years) to services and activities to improve their quality of life and social supports. Case Managers use active listening and face to face engagement with the worker to create supportive goals that promote independence and return to life. The program was expanded to 50 workers in 2020.

207 WorkSafe Claims Manual (n 3) part 2.6.3.5.

208 Victorian Ombudsman 2019 (n 61) 188.

209 WorkSafe MOC Report (n 184) 18; WorkSafe Victoria, ‘Recovery and Return to Work Program Update - formerly Back on Track’ (Presentation, December 2020) 9.

210 WorkSafe MOC Report (n 184).

Improving the experience of injured workers

Introduced	Initiative	Summary
2020-21	IME Changes	WorkSafe introduced longer appointments with specialist IMEs for injured workers who have been in receipt of benefits for >78 weeks, to ensure thorough assessment for workers with complex needs.

- 7.177. WorkSafe advised me that in late 2020 it engaged Suncorp to undertake a file review to seek an 'independent' view on whether injured workers are receiving the appropriate level of benefits to support their recovery. Suncorp is not a current WorkSafe agent but has a large workers' compensation portfolio nationwide.
- 7.178. As at April 2021, almost 400 files had been assessed as part of the review, with an expected total of 900 files to be considered by completion.
- 7.179. WorkSafe advised the Review that initial evidence from the review demonstrates that in the main, agents are managing injured workers' claims and their recovery in line with expectations.
- 7.180. Suncorp also identified several issues for further consideration, particularly for workers whose claims are older than 130 weeks. These included:
- support for the worker 'fell away' at the 26 week mark then reduced significantly at 52+ weeks. These claims appear to be managed to process and deadlines rather than injured workers' needs;
 - physical injury cases for older workers whose claims are older than 130 weeks have not demonstrated a sustained attempt at vocational roles/retraining; and
 - health care providers and IMEs typically use standard forms, which are not tailored to the situation of the specific injured workers, which do not provide well for a tailored, holistic approach..²¹¹

Industry capability training

- 7.181. The personal injury sector has been described as highly regulated and involving stressful work which 'has trouble attracting and retaining talented staff'..²¹² Submissions highlighted that having high- or low-quality case managers has a

²¹¹ [REDACTED]

²¹² DeakinCo., 'Personal Injury Education Foundation (PIEF)' (Web Page) <<https://www.deakinco.com/case-studies/personal-injury-education-foundation/personal-injury-education-foundation-pief>>.

fundamental effect on the experience of an injured worker. Poor case management was repeatedly highlighted as leading to poor outcomes for workers, disputes and an extended time in the workers' compensation scheme.

7.182. In 2006, WorkSafe partnered with other compensation authorities, insurers and third-party claims administrators to establish the Personal Injury Education Foundation (PIEF). PIEF is a not-for-profit registered training organisation, owned by its members. It aims to deliver education and events for accident compensation industry professionals.²¹³

7.183. To promote industry recognised standards of professional practice in Australia, PIEF developed the Certified Personal Injury Professional (CPIP) affiliation:

(The CPIP) designation sets the benchmark for the personal injury industry across Australia. CPIPs demonstrate the highest standards of professional practice and integrity. They are distinguished by holding a relevant industry-based qualification or recognised equivalent, maintaining up-to-date technical skills and knowledge through a program of professional development and abiding by the PIEF's Code of Professional Conduct.²¹⁴

7.184. Together with Deakin University, PIEF produced a suite of vocational workplace-based certificates and diploma programs to provide entry into graduate and post-graduate courses.²¹⁵ These may be completed in full, undertaken as individual 'nationally recognised units of competency' or in small clusters known as 'skill pods'. Learning undertaken without assessment is considered professional development.²¹⁶

7.185. PIEF courses are self-paced and delivered online via a learning management system portal. PIEF courses include:

- Certificate IV in Personal Injury Management (Return to Work or Claims Management stream);
- Certificate IV in Customer Engagement; and
- Diploma of Personal Injury and Disability Insurance Management.

213 Personal Injury Education Foundation, 'About Us' (Web Page) <<https://www.pief.com.au/about-us/about-us>>.

214 Personal Injury Education Foundation, 'Membership Information' (Web Page) <<https://www.pief.com.au/membership-information/cpip>>.

215 DeakinCo (n 212).

216 Australian Government, 'PIEF RTW Services Limited 'myskills'' (Web Page) <<https://www.myskills.gov.au/RegisteredTrainers/Campus?id=18022>>.

7.186. The post-graduate program is now delivered in partnership with the Monash University's School of Public Health and Preventative Medicine.²¹⁷ The program offers four short 'micro-credentials' leading into the post-graduate stream. The first of these micro-credentials is the 'Principles of personal injury scheme design' which is planned for delivery in April 2021.²¹⁸ Monash University describes a key learning objective of this course being to:

critique the role of personal injury statutory insurance schemes within Australia's social protection ecosystem.²¹⁹

7.187. Although not compulsory, WorkSafe and its agents encourage claims management staff to undertake professional development such as PIEF courses, to supplement their work experience and promote professional capability and industry career progression.²²⁰

217 Previously delivered through Deakin University: Personal Injury Education Foundation, 'postgraduate program' (Web Page) <<https://www.pief.com.au/education-and-training/postgraduate-program>>.

218 Personal Injury Education Foundation, 'Education & Training' (Web Page) < <https://www.pief.com.au/education-and-training/postgraduate-program>>.

219 Monash University, 'Principles of Personal Injury Scheme Design' (Web Page, March 2021) < <https://www.monash.edu/study/courses/find-a-course/2021/principles-of-personal-injury-scheme-design-pdm1138>>.

220 See Gallagher Bassett's recommendation for those interested in the industry to explore professional associations including PIEF: Gallagher Bassett, 'Explore our Industry' (Web Page) <<https://www.gallagherbassett.com.au/careers/ourindustrygb/>>. Support for staff to attain recognised qualifications: Gallagher Bassett, 'Benefits of joining the Gallagher Bassett Family' (Web Page) <<https://www.gallagherbassett.com.au/careers/benefitsgb/>>. In addition, WorkSafe previously awarded PIEF scholarships as part of the Agent Awards: Xchanging, 'Xchanging Recognised for Customer Service Excellence at 2014 VWA Agents Awards' (Press release, 11 November 2014) < <http://www.xchanging.com/au/node/39024>>.

Part C – Terms of Reference



8. Failure of the agent model

The system is at crisis point – it is no longer a system that facilitates treatment, recovery and rehabilitation for injured workers. It is a system where process and endless shuffling between IMEs, agents and case managers serves to grind down already vulnerable people and encourage them to give up.¹

Purpose of the chapter

- 8.1. Paragraph 11 of the Terms of Reference requires an assessment of ‘the suitability, adequacy and effectiveness of the outsourced agent model in the administration and management of complex claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic)’.
- 8.2. In making this assessment, paragraph 15 of the Terms of Reference requires consideration of:
 - (a) whether the agent model is effective in delivering and achieving positive health and recovery outcomes, including prompt, effective and proactive treatment and management of injuries;
 - (b) whether case management processes and practices for complex claims reflect best practice and provide tailored treatment and support based on biopsychosocial factors, individual circumstances and medical advice; and
 - (c) whether policy, oversight and governance arrangements, including financial and performance incentives support and promote best practice, timely, sustainable and quality decision making by agents.
- 8.3. In this chapter I address each of those questions before making the assessment required by paragraph 11 of the Terms of Reference.
- 8.4. I answer the questions posed by paragraphs 15(b) and (c) first as the answers to those questions inform my answer to the question posed by paragraph 15(a).

¹ Submission DP35 (IWSN) 7.

- 8.5. In the following chapter, I consider paragraph 12 of the Terms of Reference which requires consideration of future arrangements for the management of complex claims.

Do case management processes and practices for complex claims reflect best practice?

- 8.6. As a submission to the Review from the Victorian Trades Hall Council, which represents 40 affiliated unions with over 430,000 members and assists over 1,500 injured workers per year through its service 'Union Assist', pointed out 'it should be uncontroversial that agents should be making the right decisions about the well-being and rehabilitation of injured workers...'.²
- 8.7. In far too many cases they are not. Why?
- 8.8. In Chapters 6 and 7 I examined submissions to the Review, relevant Australian and overseas research and examples of case management processes and practices in other comparable compensation schemes.
- 8.9. In summary, better or best practice case management of a complex claim includes:
- early identification of biopsychosocial risk factors that make it likely that the claimant's recovery from injury and return to work will be delayed;
 - a screening approach that is overinclusive—i.e. a screening tool and process that has high sensitivity;
 - a comprehensive and timely biopsychosocial assessment of those identified of being at risk of prolonged work disability;
 - tailored biopsychosocial interventions targeted at the individual claimant commencing within the therapeutic window of 6-12 weeks of injury;
 - interventions that are overseen by appropriately skilled, trained and empathic case managers;
 - person-centred claims management;
 - consultation with the claimant and their treating health practitioners; and
 - early and regular involvement of the claimant's employer and especially the employer's return to work co-ordinator in planning for the claimant's return to work.

² Submission DP54 (VTHC) 15.

- 8.10. A group of four practitioners and researchers in the workers' compensation field submitted that 'there has been overall poor uptake of the biopsychosocial model of injury management'.³ Their concerns were not limited to the Victorian workers' compensation scheme.
- 8.11. Drawing on recent research, the submission identified the 'insurance model of workers compensation, combined with the biomedical model as the predominant model of health care' as contributing to this poor uptake. They argued for the integration of the biopsychosocial model of care 'into injury management at all levels, including the claims management system level, through health and claims organisations, employer organisations, and at the individual case level'.⁴
- 8.12. In Chapter 7 I described the 2013-2015 WISE study conducted by the Pain Management Research Institute.⁵ The joint submission considered that this important study 'has contributed significant knowledge to understanding implementation processes and challenges within injury management settings and should inform the implementation of future biopsychosocial programs'.⁶ I agree.
- 8.13. The short answer to the question posed by paragraph 15(b) of the Terms of Reference is 'no'. While there are some examples of high quality case management in the Victorian workers' compensation scheme, and there are many claims managers who are doing their very best to address the individual needs of claimants, the features of best practice claims management are not evident at a systemic level. While there is some segmenting of claims, it is not done in a way that reflects the individual needs of the claimants.
- 8.14. The case study below describes a worker's account of the negative effects of poor case management.

Case study – 'Jonathan'

Jonathan was working as a prison officer in 2012 when he took 10 prisoners white water rafting. The raft he was in overturned and he had to snap his knee to avoid drowning. Jonathan reported the injury to his employer and lodged a claim with the assistance of a union representative.

3 Submission DP24 (Wyatt et al) 12.

4 Submission DP24 (Wyatt et al) 12.

5 Michael Nicholas, 'The Work Injury Screening and Early Intervention (WISE) Study' (Web Page, Australian Pain Society) <<https://blog.apsoc.org.au/2016/10/05/the-work-injury-screening-and-early-intervention-wise-study/>>.

6 Submission DP24 (Wyatt et al) 12.

Jonathan described being '*constantly bombarded*' with case managers ringing him up to eight times a day. Jonathan's union representative was present with him on these calls and told Jonathan that a lot of what the agent was doing was unnecessary or unlawful. The union representative took steps to remove Jonathan's phone number from the agent's files, but within a few days, the calls to Jonathan started again.

Jonathan told the Review that he had to appeal to conciliation to receive any treatment, only to have the agent withdraw their decision the day before conciliation.

Jonathan said that in one report of an IME he was described as being Sudanese, and as running kilometres each day, neither of which was correct: '*Clearly the IME had the wrong person and the agent still accepted that opinion to cut off treatment*'.

When his claim reached 130 weeks mark, Jonathan said '*I was dropped like a hot potato...and you have to spend months fighting to get some sort of standard of living.*'¹

Jonathan told the Review:

if I'd had some sort of purpose other than constantly fighting the insurance company, I might have got back to work. All of my symptoms are exacerbated by dealing with the insurance company. There was no help from them to get me back to the workplace. Not once did they suggest getting me retrained in some area that might help me not develop major mental health issues on top of my PTSD'

When asked what he would like to see changed in the system, Jonathan recommended that retraining for injured workers needs to be a priority.

Do policy, oversight and governance arrangements, including financial and performance incentives support and promote best practice?

- 8.15. Paragraph 15(c) of the Terms of Reference calls for an examination of WorkSafe's oversight of its agents and, in particular, the financial incentives it offers them.

The system is operating as it was designed to operate

- 8.16. The claims management system that has been examined in this Review has emerged from the historical processes described in Chapter 2 and the various reviews described in Chapter 5. WorkSafe controls what its agents do and what their priorities are. As an agent pointed out, the parameters of the current system are '*largely set by WorkSafe through policies, processes and systems*'..⁷
- 8.17. The same point was made by the joint submission of members of the Review's expert panel:

⁷ Submission DP55 (WorkSafe agent, name withheld) 9.

Improving the experience of injured workers

WorkSafe dictates the processes claims agents need to follow. The insurer's model seems to be the source of the majority of claims agents' behaviours.⁸

- 8.18. How do WorkSafe's policies, processes and systems impact on management of complex claims by its agents? One of the agents submitted that:

To some extent, effective management of complex claims is often reliant on the experience, confidence and initiative of individual case managers to work "outside of the system" to enable individualised case management in resolving the individual barriers to return to work for each injured worker.⁹

- 8.19. The agent further submitted:

With agents directed to align resources on scheme liability, the management of complex claims had historically not been prioritised. The limited tools available and the long-standing policies and procedures made innovative thinking and problem solving challenging to implement....

Additional factors that contribute to limiting agent support of complex claims include the complexity of the legislation, varied stakeholder expectations, outdated (and multiple) operating systems, staff capability, changing community standards and an increase in mental injury claims.¹⁰

- 8.20. However, another agent (Gallagher Bassett) appeared to see things differently:

The current model allows Agents a degree of agility in this environment and ensures that we continue to proactively review and tailor our processes to meet the needs of injured workers throughout the life cycle of their claim.

GB's current claims model introduced in late 2019 is an example of the flexibility and agility that the Scheme provides to Agents.¹¹

- 8.21. It is not easy to reconcile these very different views about whether the current system enables agents to implement best practice case management of complex claims. However, what is clear is that they are having limited success.

Financial incentives

- 8.22. The Review received many submissions that were critical of the role played by the financial incentives WorkSafe offers its agents.

- 8.23. As one agent recognised:

8 Submission OP7 (Expert academic and medical professional group) 9.

9 Submission DP55 (WorkSafe agent, name withheld) 9-10.

10 Submission DP55 (WorkSafe agent, name withheld) 21-22.

11 Submission DP27 (Gallagher Bassett) 13.

financial incentives play a pivotal role in determining agent priorities.¹²

- 8.24. As explained in Chapter 4, there are two components to the payments WorkSafe makes to its agents for issuing insurance, collecting premiums and managing claims. The first is an annual fee which covers the agent's core costs. The second is a system of financial rewards and penalties, known as the 'Annual Performance Adjustment'.
- 8.25. The mix of incentives has historically been more focused on liability management, service and return to work than on measures directly incentivising agents to improve their management of complex claims.
- 8.26. Several submissions highlighted that WorkSafe's financial incentives for agents contribute to poor claims management.¹³ The submission by the Royal Australian College of General Practitioners was typical of many when it stated that the experience of its members highlights that:

inappropriate metrics are used to measure success within the scheme, which result in inappropriate and harmful claims management by agents and by WorkSafe:

- Current metrics for success, and therefore for the payment of financial incentives, are all time-based including return to work or time to end claim; and
- Agents are rewarded if they return workers inappropriately to work, end claims within deadlines (irrespective of outcomes) and avoid paying out entitlements'.¹⁴

- 8.27. WorkSafe's oversight of its agents was examined in detail in Chapter 4. It was noted that WorkSafe's oversight of its agents takes a number of different forms. It prescribes the manner in which they are to manage claims through an agency agreement and a claims manual. It audits the conduct of its agents. It responds to complaints about them and it requires them to survey workers and employers about their experiences.
- 8.28. These arrangements ultimately determine how the agents manage claims. As one submission put it, WorkSafe 'dictates the processes claims agents need to follow' and therefore, its model 'seems to be the source of the majority of claims agents' behaviours'.¹⁵

12 Submission DP58 (Xchanging) 12.

13 See, eg, Submissions DP8 (ACJI Monash), DP30 (HACSU), DP39 (LIV).

14 Submission DP43 (RACGP) 3.

15 Submission OP7 (Expert academic and medical professional group) 9.

- 8.29. As noted in Chapter 4, these oversight arrangements and, in particular, the financial and performance incentives, have historically been principally concerned with rewarding agent behaviour that promotes the financial viability of the scheme. This has included rewarding agents for removing injured workers from the scheme regardless of whether those workers had regained their pre-injury health or had returned to work on a sustainable basis.
- 8.30. In more recent years, largely in response to the first Ombudsman's report of 2016, the incentives have been changed to reward return to work and quality of decision making. The 'continuation' incentive which rewarded agents for terminating the entitlements of workers has gradually been removed.
- 8.31. It is important to note that these recent changes to the incentives are merely the latest in a series of changes which have attempted to influence the behaviour of WorkSafe's various agents. I examined these changes earlier in this report in Chapter 4. The joint submission by members of the Review's expert panel correctly observed that 'there have been multiple attempts at incentivising appropriate practices [by agents] and these have not been successful'.¹⁶
- 8.32. These changes have been implemented quite slowly, a matter that was the subject of criticism by the Ombudsman in her second report of 2019.¹⁷ It was only when the Annual Performance Adjustment for 2020-21 was published that this process was completed. The financial incentives are no longer rewarding agents for removing workers from payments.
- 8.33. The impression I have gained from the submissions to this Review is that the changes to the financial incentives are not well understood even by close watchers of the scheme. There is a perception that agents continue to be rewarded for ending claims whether or not the worker has returned to work. The lack of transparency surrounding the financial incentives can be seen as being counter-productive in this regard. WorkSafe should do more to ensure that the public is informed about the financial incentives it offers to its agents. When the incentives for each year are settled, they should be published on the WorkSafe website.
- 8.34. The current incentives place a greater emphasis on 'sustainable' return to work although, whether a return to work for three weeks can be said to be sustainable in all cases is questionable. One submission from a union described the current

¹⁶ Submission OP7 (Expert academic and medical professional group) 9. See also Submission DP3 (Alan Clayton) 18-19.

¹⁷ Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019) ('Victorian Ombudsman 2019').

measure as ‘entirely inadequate’ and suggested that the measure ought to be a return to ‘meaningful employment for a sustained period, for example, 6 or 12 months’.¹⁸ A submission from plaintiff law firm, Slater and Gordon Lawyers pointed out that three weeks is a ‘very short term measure and does not incentivise Agents or employers to ensure long-term success of a return to work’.¹⁹

- 8.35. The most recent review of the Queensland scheme raised similar concerns. The 2018 Peetz Report recommended a greater emphasis on ‘sustained or “durable” return to work, especially amongst workers who have been difficult to place back in work in the early months after injury’.²⁰ Recommendation 6.1 of the Peetz Report, which was aimed at follow up of injured workers after their claims had been closed, was aimed at these workers. The follow-up of workers after they have left the scheme should be a matter examined as part of the regular legislated scheme review I am proposing (see Recommendation 9).
- 8.36. Turning to the question posed by paragraph 15(c) of the Terms of Reference, it is difficult to express a view about the effectiveness of current oversight arrangements with any confidence because data about the effects of these very recent changes to the incentives is not available. As with other changes to oversight arrangements, there is insufficient evidence upon which to express a firm view about their effect. Having said that, the continued high number of complaints about the scheme received by the Ombudsman since her 2019 report was published (discussed in Chapter 5) is cause for concern.

Recommendation 1: Transparency about agents’ incentives

WorkSafe should publish on its website a plain English explanation of the financial incentives and penalties it offers its agents. This should include:

- what the purpose of each incentive/penalty is; and
- what incentives are paid or penalties imposed in each year and the reasons for these.

18 Submission DP16 (ASU) 4.

19 Submission DP45 (Slater and Gordon Lawyers) 16.

20 David Peetz, *The Operation of the Queensland Workers’ Compensation Scheme: Report of the Second Five-Yearly Review of the Scheme* (Report, 27 May 2018) xii.

Recommendation 2: Monitoring agent behaviour

The WorkSafe Reform Implementation Monitor should monitor and publicly report upon the effect of the changes to the financial incentives on agent behaviour.

Is the agent model effective in delivering and achieving positive health and recovery outcomes?

8.37. In the second of her investigations into the management of complex claims by WorkSafe's agents, the Victorian Ombudsman concluded:

The investigation revisited issues the Ombudsman identified in 2016, to establish whether the Ombudsman's recommendations had improved agent decision making and the effectiveness of WorkSafe's oversight of complex claims.

While these recommendations resulted in some changes to policies, procedures and practices, the evidence suggests that they were not enough to change agent behaviour and stop unreasonable decision making on complex claims.

After two investigations by the Ombudsman and a number of reviews commissioned by WorkSafe, *the evidence points to this being a systemic problem*. In too many complex claims, the system is failing to achieve one of the scheme's objectives under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), which is to ensure appropriate compensation be paid to injured workers 'in the most social and economically appropriate manner, as expeditiously as possible'.²¹

Not just the Ombudsman

8.38. It is not just the Victorian Ombudsman who has expressed concerns about the management of complex claims by agents. Similar concerns have been expressed strongly in submissions to this Review. For example, the Royal Australian College of General Practitioners, which represents over 41,000 general practitioners, described the behaviour of all five agents as 'reprehensible in many instances'.²² The Victorian Trades Hall Council submitted that, since the 2016 Ombudsman report, the 'behaviour of agents continues to be unfair, unreasonable, illogical, uncaring and absent of best practice'.²³

21 Victorian Ombudsman 2019 (n 17) 219, emphasis added.

22 Submission DP43 (RACGP) 2.

23 Submission DP54 (VTHC) 26.

Improving the experience of injured workers

- 8.39. Independent reviews commissioned by WorkSafe have reached similar conclusions.
- 8.40. For example, the Institute for Safety, Compensation and Recovery Research concluded a report into 'long term' claims in 2018. Claims where a worker had received payments for more than one year were examined to determine:
- factors influencing the development of such claims;
 - the impact on workers;
 - ways to reduce claim duration; and
 - how to improve return to work outcomes.
- 8.41. Only 44% of survey participants believed that the WorkCover system treated them fairly and only 29% felt the system worked in their best interests. Moreover, when asked specifically about the agent with which they dealt, 'more than half of the participants reported that their insurance agent did not treat them fairly, with 32% strongly supporting this'.²⁴ Only 7% (approximately 1 in 14) of participants 'believed both they were treated fairly by their insurance agent and did not express any frustration at having to repeat information'.
- 8.42. These results may be contrasted with those which emerge from WorkSafe's 'Injured Workers Survey' which was described to the Ombudsman by both WorkSafe and agent executives as 'a key mechanism to ensure the quality of agent decision making'.²⁵
- 8.43. The evidence and submissions to this Review support the Ombudsman's conclusions that there are systemic problems associated with the administration and management of complex claims under the agent model. Further, those problems are preventing WorkSafe meeting one of its crucial statutory objectives—'to ensure that appropriate compensation is paid to injured workers in the most socially and economically appropriate manner and as expeditiously as possible'.²⁶
- 8.44. The overwhelming majority of submissions to the Review were highly critical of the management of complex claims under the agent model.²⁷ While most of

²⁴ Institute for Safety, Compensation and Recovery Research, *Survey of long-term injured workers* (Research Report No 184, November 2018) 26-27.

²⁵ Victorian Ombudsman 2019 (n 17) 184.

²⁶ WIRC Act s 492(c).

²⁷ See, eg, Submissions DP3 (Alan Clayton), DP12 (AMWU), DP16 (ASU), DP45 (Slater and Gordon Lawyers), DP54 (VTHC).

these submissions were from unions, health practitioners and independent experts and researchers, the criticisms were not limited to those sources.

8.45. For example, an agent submitted that:

Current claims management practices based around policies, processes and systems which are heavily process-focused by design, limit the ability of case management to work outside of these parameters. Additionally, many policies and procedures have been quite rigid in their implementation, restricting the ability for claims staff to be innovative and person-centred in their approach.

Many of the policies and procedures still in practice were introduced during a time where liability management was a necessary and key priority for the scheme. A broad review of policies and procedures, particularly relating to medical and like services, along with the implementation of a more contemporary claims management system which enables greater worker access to their own information, would assist them to feel in control of their return to work and recovery and would make a substantial improvement in how complex claims are managed.

Current case management practices are somewhat limited by systems and processes which can result in a “one size fits all approach”. **To some extent, effective management of complex claims is often reliant on the experience, confidence and initiative of individual case managers to work “outside of the system” to enable individualized case management in resolving the individual barriers to return to work for each injured worker.**²⁸

8.46. The last emphasised sentence is an indictment of the Victorian workers’ compensation system in 2021.

8.47. If anything, the case for what the Ombudsman described as ‘nothing short of wholesale changes to the system’ has been strengthened.²⁹ There is a wide gap between current Victorian complex claims management practice on the one hand and better or best practice as described in the research examined in Chapters 6 and 7 on the other.

8.48. My examination of interstate and overseas compensation schemes under which claims are managed directly by the insurer itself has convinced me that it is both desirable and feasible to fundamentally change the way Victorian workers’ compensation claims are managed. Whether there should be any ongoing role for the agent model under the new proposed arrangements is addressed in the following chapter.

²⁸ Submission DP55 (WorkSafe agent, name withheld) 9-10 (emphasis added).

²⁹ Victorian Ombudsman 2019 (n 17) 11.

- 8.49. Paragraph 15(a) of the Terms of Reference asked whether the agent model is effective in delivering and achieving positive health and recovery outcomes, including prompt, effective and proactive treatment and management of injuries. The answer to that question is ‘no’.

The suitability, adequacy and effectiveness of the outsourced agent model in the administration and management of complex claims

- 8.50. In light of the above answers to the questions posed by paragraphs 15(b) and (c) of the Terms of Reference, I conclude under paragraph 11 of the Terms of Reference that the administration and management of complex claims under the outsourced agent model is unsuitable, inadequate and ineffective. This is because complex claims administration and management by WorkSafe’s agents under current arrangements is not maximising outcomes for injured workers. Further, the agent model has not been maximising outcomes for injured workers for a number of years, as demonstrated by a number of the independent reports discussed in Chapter 5.
- 8.51. In fact, in far too many cases the opposite is the case: the way a significant number of claims are managed, especially those involving mental injuries, is inhibiting the recovery of the workers involved. Based on the evidence presented to the Ombudsman and to this Review, it is not an overstatement to say that the workers’ compensation system is, in some cases, destroying lives.
- 8.52. This Review has been told of the toll that the current system is taking on injured workers by workers themselves, family members, health professionals, unions and lawyers. Many of these harrowing accounts have been difficult to listen to but they have graphically demonstrated the toll that the system is taking on some of Victoria’s already most damaged and vulnerable people. This is obviously a terrible indictment of any social insurance system; it is especially so in respect of the system that was introduced with much fanfare thirty-six years ago.
- 8.53. The evidence I have examined, together with that discussed in the Ombudsman’s reports and other research reports, has clearly established that the current claims management model is not fit for purpose, at least in relation to complex claims.

- 8.54. The problems identified in this report are not new. As the Ombudsman concluded, piecemeal changes have proven unsuccessful in addressing these problems and ‘more significant changes’ are needed.³⁰
- 8.55. The question that remains is what should replace the current model? In particular, can the agent model, in some modified form, be part of the solution or has it run its race? If the agent model cannot be satisfactorily improved, should it be scrapped in its entirety?
- 8.56. Alternatively, should there be, at least in the short term, some form of hybrid system which sees complex claims managed in-house by WorkSafe but the agents remaining responsible for other simpler claims? If complex claims are not to be managed by agents, is WorkSafe currently equipped to carry out its statutory responsibilities directly? And finally, if it is not, what changes does it need to make so that it is capable of doing so and how long will that take?
- 8.57. These important questions are raised by paragraph 12 of the Terms of Reference and they are addressed in the next chapter.

³⁰ Victorian Ombudsman 2019 (n 17) 219.

9. A claims management model for the future

'... the agency model has limped on, for three and a half decades, as a totally sub-optimal vehicle for serving the needs of injured workers and employers in the workers' compensation system'.¹

'This Review is a chance for WSV to lead the way to a more effective system'.²

Key points

- The high number of complaints the Ombudsman continues to receive about WorkSafe and its agents, combined with the submissions received by the Review, provides little confidence that the agent model, even in a modified form, can provide quality case management for complex claims.
- WorkSafe should assume responsibility for identifying if injured workers' claims are complex or at risk of becoming complex and should directly manage these claims. This will achieve better outcomes for injured workers.
- WorkSafe should establish a Complex Claims Unit and manage claims having regard to the individual needs of the worker and using a biopsychosocial approach.
- The Complex Claims Unit should be staffed with appropriately trained and skilled staff.
- Claims that are not assessed as complex by WorkSafe should be managed by agents. However, agents should monitor claims for signs of complexity.

Introduction

9.1. Paragraph 12 of the Terms of Reference requires me to investigate and report on two distinct but related questions:

- How complex claims should be managed; and

¹ Submission DP3 (Alan Clayton) 1.

² Submission DP14 (APS) 7.

- By whom complex claims should be managed to maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme?
- 9.2. In making this assessment, paragraph 16 requires me to consider ‘the implications of retaining, limiting or removing agents from performing claim management functions on behalf of WorkSafe’.
- 9.3. Further, paragraph 18 requires that, in forming my recommendations, I must have regard to ‘the implications of any changes for the financial viability of the workers’ compensation scheme and the cost of WorkCover insurance for employers’.
- 9.4. I examine these aspects of the Terms of Reference in this chapter although some matters have been discussed earlier in the report.
- 9.5. As will emerge presently, the answer to the question of ‘how’ complex claims should be managed to achieve the identified outcomes necessarily points to the answer to the second question—‘by whom’ that should be done to achieve those outcomes. That is because, as discussed in the previous chapter, the evidence clearly demonstrates that the agent model is incapable of managing this cohort of claims in the manner required to maximise outcomes for injured workers.
- 9.6. The inverse is equally true. As a submission from one of the agents put it, ‘without a change to how claims are managed, the “who” won’t provide any substantial change’.³

How should complex claims be managed to maximise outcomes for injured workers?

- 9.7. As explained in Chapter 1, the Review brought together a group of internationally recognised experts in the field of workers’ compensation to assist my understanding of current best practice claims management. Helpfully, a number of those same experts put in a joint submission in response to the options paper that was released in late 2020.⁴ In that submission, the expert group stated that:

We now have strong evidence that unnecessary work disability, which accounts for many complex claims, can be substantially reduced by coordinated case

³ Submission OP16 (WorkSafe agent – name withheld) 15.

⁴ The contributors to the joint submission are Ms Samantha Barker, Professor Ian Cameron, Associate Professor Alan Clayton, Professor Alex Collie, Ms Janet Dore, Dr Pam Garton, Dr Robyn Horsley OAM, Dr Ross Iles, Professor Michael Nicholas, Dr Michael Sullivan and Dr Mary Wyatt.

Improving the experience of injured workers

management focused on early identification of pre-existing biopsychosocial barriers, early and timely ongoing support and quality decision making. For most everyday claims, the factors that result in case complexity are modifiable. That is, they can be identified early and managed to minimise the risk of claims becoming complex.⁵

- 9.8. As described in Chapters 6 and 7, this submission is well supported by published research.
- 9.9. Research demonstrates that better or best practice case management has a number of features which include, it should:
- have a preventative focus;
 - adopt a biopsychosocial approach;
 - have a public health dimension;
 - be individualised, proactive and person-centred; and
 - wherever possible, be provided by one appropriately trained and qualified claims manager for the life of the claim.
- 9.10. These features, which are examined in detail in Chapters 6 and 7, are summarised below.

A preventative focus

- 9.11. The Terms of Reference require consideration of the 'management' of complex claims. The joint submission of members of the Review's expert panel suggested that, in this context, 'management' should be understood as:

'...a broad term that includes taking into account pre-existing issues, monitoring and dealing with problems that arise, but more importantly setting up systems that prevent or minimise the likelihood of problems occurring'.⁶

- 9.12. The experts submitted that best practice claims management must have a preventative focus – including 'preventing the original illness (health and safety, primary prevention) and also prevention of the unnecessary consequences, such as unnecessary work disability (secondary and tertiary prevention)'.⁷
- 9.13. An agent, Gallagher Basset submitted, 'the best injury or claim outcome occurs when it can be prevented'.⁸

5 Submission OP7 (Expert academic and medical group) 3.

6 Submission OP7 (Expert academic and medical group) 3.

7 Submission OP7 (Expert academic and medical group) 3.

8 Submission DP27 (Gallagher Basset) 28.

Improving the experience of injured workers

9.14. The Royal Australasian College of Physicians submitted that:

...it is essential that the Victorian workers' compensation system places more emphasis on the prevention of injury. Injury prevention is an area which presents valuable opportunities to reduce workers' compensation costs from the onset for all scheme participants and society more generally'.⁹

9.15. In relation to primary prevention, most workers' compensation claims will provide lessons about prevention of future injuries. While prevention is primarily the responsibility of employers, WorkSafe is required, under the WIRC Act, to 'assist employers and workers in achieving healthy and safe working environments'.¹⁰ WorkSafe can do this in a number of ways including by sharing the lessons from workers' compensation claims with employers.

9.16. In addition to the injury prevention role conferred on WorkSafe by the WIRC Act, it also has a number of injury prevention roles under the OHS Act 2004.¹¹

9.17. The 2003 review of now President of the Court of Appeal, The Hon Justice Maxwell identified the 'obvious synergies' between WorkSafe's prevention and compensation functions. As Maxwell put it:

Pro-active and effective regulation of health and safety at the workplace ...will reduce – if not eliminate – the risk of injury or death occurring at that workplace.¹²

9.18. Maxwell considered that the principal advantage of WorkSafe having responsibility for both prevention of workplace injuries and compensation of injured workers is its ability to make use of compensation data to inform its prevention work.¹³ A generation before that, the Cooney Report of 1983 identified prevention of workplace injury as the primary purpose of any workers' compensation scheme as had the seminal Woodhouse inquiry of 1974. That clearly remains the case.

9.19. Eighteen years after the Maxwell Review, WorkSafe is not adequately focusing on prevention in the performance of its compensation function. The impression I have been left with is of two organisations, one which deals with prevention and the other which deals with compensation and rehabilitation, both operating under the auspices of the one entity. What I should have found is an integrated

9 Submission DP6 (RACP) 6.

10 WIRC Act s 493(1)(c).

11 See for example the functions set out in *Occupational Health and Safety Act 2004* (Vic) s 7 ('OHS Act 2004').

12 Chris Maxwell, *Occupational Health and Safety Review* (Final Report, March 2004) 47.

13 Maxwell (n 12) 47-48.

organisation using all of its resources and all of its vast amount of injury data to inform its prevention work.

- 9.20. This is likely to be a further disadvantage of the agent model. Because WorkSafe is at arms-length from the day-to-day management of claims, and therefore at arms-length from employers, it is quite limited in its ability to make full use of claims information to improve its prevention of workplace injuries. Although prevention of workplace injury and disease is one of the matters that agents are required to address under the agency agreements,¹⁴ prevention of work injuries has never been one of the areas identified for incentive payments under the arrangements by which agents are remunerated by WorkSafe.¹⁵
- 9.21. Gallagher Bassett submitted that consideration should be given to including measurement of agent activities 'focused on prevention to reduce harm and injuries to employees'.¹⁶ I agree and note that Gallagher Bassett has 'commenced working with employers to support injury prevention...'.¹⁷ This is an example of an initiative that WorkSafe should examine and consider expanding as it transitions to manage complex claims directly (see Recommendation 7)
- 9.22. Discussing how claims managers can help to prevent future psychological injuries, Safe Work Australia notes that research establishes that 'work-related factors such as high work demand, low control and low support, can pose risks to mental health'.¹⁸ Safe Work Australia points out that:
- The claims process can provide valuable insights on mental wellbeing for improving the workplace. [The claims manager's] role may include communicating these insights, which employers can use to improve the working environment more broadly.¹⁹
- 9.23. In my view this, if anything, understates the role that claims managers can play in preventing future workplace injuries. There will be lessons for employers that arise from the investigation of many workers' compensation claims especially those involving mental injuries. Claims managers will see patterns to claims, which individual employers will not be aware of. A central role of claims

14 WorkSafe Victoria, *Agency Agreement between Victorian WorkCover Authority and Agent 2016–21*, sch A, cl 4.

15 The way WorkSafe remunerates its agents is discussed in Chapter 4 from 4.75.

16 Submission DP27 (Gallagher Bassett) 28.

17 Submission DP27 (Gallagher Bassett) 28.

18 SuperFriend and Safe Work Australia, *Taking Action: A best practice framework for the management of psychological claims in the Australian workers' compensation sector* (Report, 2018) 31 ('Taking Action'); see generally Royal Commission into Victoria's Mental Health System, *Final Report* (Report, February 2021).

19 SuperFriend and Safe Work Australia, *Taking Action* (n 18) 31.

managers should be to identify those patterns and communicate these lessons and thus ensure that future work injuries are prevented. For example, a claims manager that was aware that an employer was the subject of repeated claims for primary mental injury arising out of bullying in the workplace should be encouraged to share that information with the preventative component of WorkSafe's role. This does not currently occur to the extent that it should. It should be a central part of the role of WorkSafe management of complex claims in future.

- 9.24. One benefit of WorkSafe assuming responsibility for complex claims management should be greater integration of the prevention, compensation and rehabilitation functions. It will be recalled that the Cooney Report, which led to the establishment of the current scheme, considered that 'the pre-eminent objective of the workers' compensation system should be the prevention of industrial injuries and occupational diseases'.²⁰
- 9.25. While as noted, the remuneration incentives have never rewarded such activities.

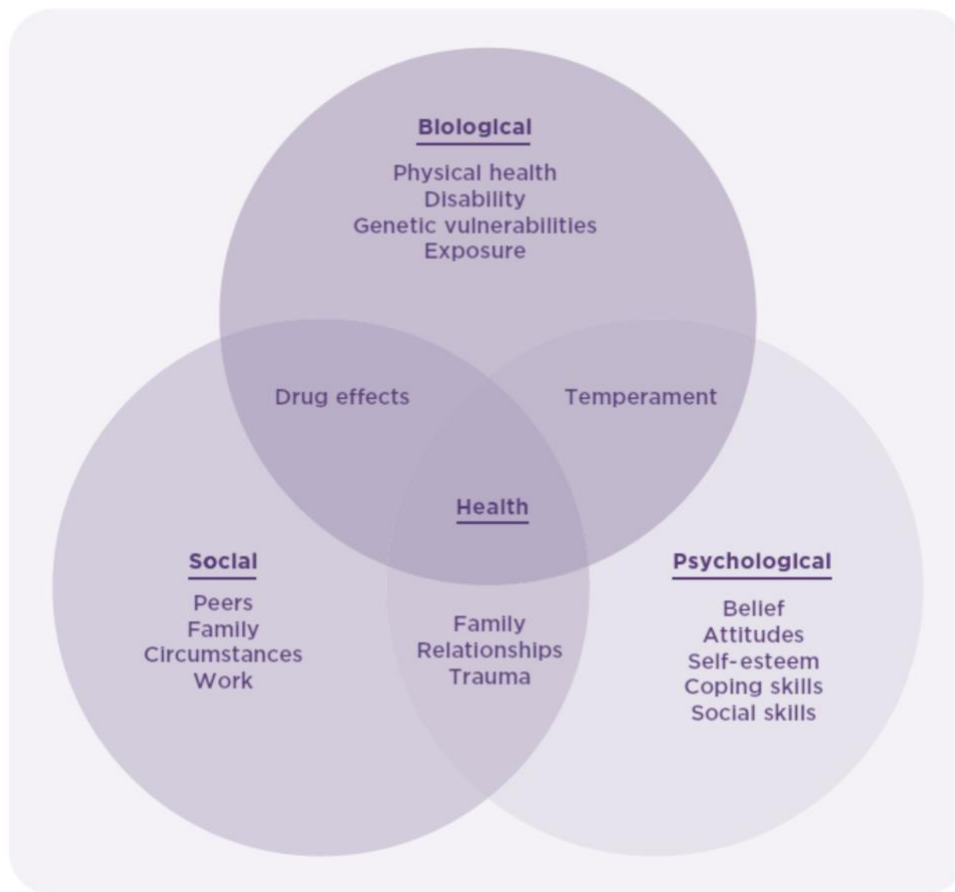
A biopsychosocial approach

- 9.26. As detailed in Chapters 6 and 7, the submissions to this Review contend, and the published research establishes, that better or best practice risk identification and claims management involves taking a 'biopsychosocial' approach to understanding an injured worker and their needs.
- 9.27. Such an approach 'takes a holistic view of disability, understanding that social and environmental factors also influence disability alongside biological factors'.²¹ It is particularly important for psychological claims, both primary and secondary.

20 B. C. Cooney, *Committee of Enquiry into the Victorian Workers' Compensation System 1983/84* (Report, 1984) ch 3, 17. This is reflected in s the WIRC Act s 10(a).

21 SuperFriend and Safe Work Australia, *Taking Action* (n 18) 16.

Figure 8: A biopsychosocial model.²²



Individualised treatment of injured workers that empowers them

9.28. According to Safe Work Australia, best practice management of psychological (and other) claims requires the claims manager to ensure that the injured worker:

...is empowered and motivated to make evidence-based and informed decisions that promote wellbeing, including about early intervention, treatment and rehabilitation, and how and when to return to work..²³

9.29. The South Australian workers' compensation scheme is an example of a statutory scheme that has transitioned to take more of a person-centred approach.

9.30. The South Australian scheme has been through a period of major reform during the last decade. The enactment of the *Return to Work Act 2014 (SA)* was a central

²² SuperFriend and Safe Work Australia, Taking Action (n 18) 16.

²³ SuperFriend and Safe Work Australia, Taking Action (n 18) 15.

Improving the experience of injured workers

part of those reforms. Under the Act, the government entity managing the scheme was recast as the 'Return to Work Corporation' emphasising its principal role of ensuring injured workers are assisted to return to work..²⁴

9.31. The Act came into operation on 1 July 2015 and was the subject of a statutory review by John Mansfield QC in 2018..²⁵

9.32. The Mansfield Review quoted from a submission it received from Mr Peter Wilson, a provider of rehabilitation services, who was previously an injured worker. Mr Wilson contrasted his experiences under the old scheme with those he had under the new scheme:

“...my experience with the old scheme was very negative, I was always made to feel the victim and [that] inherently left me with an entitlement type attitude, I was never offered information that would empower me to make good choices instead [I was] treated like a criminal and constantly threatened, it appeared no one cared, and no one listened. Since 2015 this has been turned on its head... the simple act of listening to someone and tailoring services to their particular needs was completely exempt in the past and in my opinion was the root of most disputes, quite simply the claims managers didn't have enough personal information to make informed decisions to effectively manage the claim.”

9.33. As Mansfield observed, 'Mr Wilson's submission emphasises the importance of workers' individual characteristics being considered by compensating authorities and service providers'..²⁶

Continuity of claims managers

9.34. Better or best practice claims management requires, wherever possible, a single point of contact and end-to-end case management for the injured worker, their treating health practitioners and other important parties such as the employer..²⁷

9.35. Partly because of the design of the current claims management model, this is not currently the experience of workers with longer term claims. As Gallagher Bassett explained:

The current model is based on specialisation with claims moving to different claim specialists based on duration of claim as opposed to complexity. This has led to

24 See *Return to Work Act 2014 (SA)* s 13(2).

25 The Review was required by the *Return to Work Act 2014 (SA)* s 203.

26 John Mansfield, *Independent Review of the Return to Work Act 2014* (Report, 4 June 2018) 73.

27 SuperFriend and Safe Work Australia, *Taking Action* (n 18) 24.

Improving the experience of injured workers

multiple changes in claims specialists over time, which is a source of dissatisfaction and stress.²⁸

9.36. These changes are exacerbated by the high staff turnover experienced by agents, a problem identified by the Victorian Auditor-General as long ago as 2002.²⁹

9.37. The lack of relevant expertise on the part of claims management staff was recognised by a Commonwealth parliamentary inquiry in 2003, which noted that:

Workers' compensation schemes commonly do not have the expertise needed to assist injured workers in developing positive career plans. The person managing the initial stages of the injured worker's case is not usually accountable or responsible for the long term consequences if the client is unable to return to work, or for the potential costs in the form of common law settlements. There are particular skills and expertise required in supporting injured workers to change careers and employment options.³⁰

9.38. As an employer organisation submission to this Review observed, 'bringing those skills to bear, sooner rather than later, can only serve to reduce the likelihood of a claim becoming complex'.³¹

A public health approach

9.39. In a submission to the Review, the Insurance Work and Health Group, Monash University noted that:

[M]any of the factors that influence return to work are related to the worker and their local environment (e.g. their family and social circumstances, their workplace). A public health model would recognise the importance of these factors and would develop and deliver responses that address those issues.³²

9.40. The Group noted that other features of such an approach would include:

... embedding assessment of service quality and quality improvement initiatives; regular collection and disclosure of data related to the experiences and outcomes of participants in the scheme; investment in training and education and skills development of front-line workers; funding a broader range of supports and services that recognise psychological and social influences on return to work; rigorous identification and removal/modification of harmful processes and practices ("first, do not harm"); involving participants in the design of scheme processes and

28 Submission DP27 (Gallagher Bassett) 36.

29 See Chapter 5; see also Submission DP3 (Alan Clayton) 9-11.

30 House of Representatives Standing Committee on Employment and Workplace Relations, Parliament of Australia, *Back on the Job: Report into aspects of Australia's Workers' compensation schemes* (June 2003) 80.

31 Submission DP41 (MBV) 3.

32 Submission DP36 (IWHG Monash) 7.

Improving the experience of injured workers

practices; and perhaps, most importantly, *recognising that the return to work and health objectives of the compensation scheme are its primary objectives, with financial stability an important enabling concept but not the primary focus of scheme activities.*³³

9.41. The Royal Australasian College of Physicians submitted that:

The expertise of specialist occupational and specialist physicians needs to be utilised and integrated at senior levels of the system to assist in promoting best practice worker-centric claims processing, development and sustainment of an appropriate organisational culture contributing to evidence-based claims policies and management, training of staff, identification of opportunities for prevention of injury and promotion of the health benefits of good work both within the regulator and within employers.³⁴

9.42. The Royal Australasian College of Physicians proposed 'establishing a role equivalent of a Chief Medical Officer (CMO) and/or Chief Return to Work Officer within WorkSafe and ... ensuring this expertise is reflected at senior levels of the organisation including in the composition of the Board'.³⁵

9.43. An alternative may be to ensure that there are medical practitioners appointed to any future advisory committee(s) that are established as a result of the review of current arrangements I recommend (see Recommendation 13). An example of such an approach is the Minister's Advisory Committee in South Australia which requires three of its nine members to be appointed 'on the Minister's nomination made after consultation with 1 or more professional associations representing medical practitioners'.³⁶

9.44. I consider these ideas to be worthy of consideration by WorkSafe. I agree that there should be greater use of medical expertise within WorkSafe as part of a reorientation of the organisation to one that takes more of a public health approach to the running of the workers' compensation scheme.

By whom should complex claims be managed?

9.45. The second matter I am required to address under paragraph 12 of the Terms of Reference is 'by whom complex claims should be managed?'

33 Submission DP36 (IWHG Monash) 7 (emphasis added).

34 Submission DP6 (RACP) 4.

35 Submission DP6 (RACP) 8.

36 *Return to Work Act 2014* (SA) s 171(2)(a).

- 9.46. As described in Chapter 1, consultation was conducted using a variety of methods during 2020 and 2021. These included an online survey, virtual meetings and submissions to a discussion paper released in August 2020 and an options paper released in December 2020.
- 9.47. Many submissions to the discussion paper considered *who* should manage complex claims. They almost unanimously rejected the status quo as a realistic option.
- 9.48. Responses generally fell into two categories. The first category considered that agents should continue to manage complex claims. These responses suggested that effective management of complex claims is best achieved through modifications to existing processes. This response came largely from agents, employer groups, and some occupational rehabilitation providers.³⁷

Why agents should continue to manage complex claims

- 9.49. The key reasons provided in consultations and submissions in support of agents managing complex claims are described below.
- **Continuity of case management for injured workers**—it is disruptive for workers to have their case management transferred. Some submissions suggested that complex claims should remain with agents to ensure continuity of claims management. This continuity would be lost if the claim was transferred to another agency such as WorkSafe.³⁸
 - **Perverse incentives**—Australian Industry Group suggested that if complex claims were to be removed from agents the agents may decide 'not to deal with difficulties at the start of a claim as they know that once it reaches a predetermined milestone it will be transferred to WorkSafe'.³⁹
 - **Workforce and infrastructure for complex claims management**—Some submissions pointed to workforce and infrastructure concerns as a reason why complex claims management is best left with agents.⁴⁰ Agents have the staff and supporting infrastructure, systems and processes to manage complex claims, whereas WorkSafe does not. For WorkSafe to take on the function of complex claims manager, it would need to recruit. Recruitment of suitably skilled staff to manage complex claims would inevitably involve some recruitment from existing agents, effectively shifting the current set of claims managers from one employer to another.

³⁷ See, eg, Submissions DP10 (Ai Group), DP15 (ARPA), DP27 (Gallagher Bassett), DP58 (Xchanging).

³⁸ See, eg, Submissions OP4 (ARPA), OP8 (Gallagher Bassett), OP15 (WorkSafe agent, name withheld).

³⁹ Submission OP1 (Ai Group) 2.

⁴⁰ See, eg, Submissions DP10 (Ai Group), DP27 (Gallagher Bassett), DP58 (Xchanging), DP59 (WorkSafe agent, name withheld), OP12 (VACC), OP13 (VFF).

- **Competition between agents in the multi-agent model drives innovation and improvement**—Some submissions suggested that a multi-agent model drives innovation.⁴¹ Agents innovate to improve processes and outcomes to gain new business from employers. They can also draw on the experience of their organisations in other jurisdictions to improve processes in Victoria. Reducing competition through moving to a single complex claims management provider could reduce the likelihood of innovation.
 - **Pre-existing relationships between employers and agents**—Submissions emphasised the critical role of the employer in a workers' compensation claim. Any successful change to the management of complex claims would need employer 'buy-in'. Some submissions suggested that the strong relationships and communication channels between agents and employers would assist with this.⁴²
- 9.50. Each of the existing agents (except CGU) provided detailed submissions that argued they should continue to manage complex claims. While they all accepted that there were deficiencies in the way agents are currently doing this, they submitted that they could establish dedicated complex claims management units which would address the concerns raised by the Ombudsman and therefore ensure improved management of complex claims in future.⁴³
- 9.51. A submission by one agent was typical of those advocating for a continuation of the agent model albeit with modifications. The agent identified the following 'core features' as demonstrating the merits of the agent model:
- **End-to-end claims management** – an integrated claims model enables early assessment and identification of complex claims, allowing intervention to occur as the need is identified.
 - **Agents, as independent and experienced claims management specialists**, are staffed and led by workers' compensation specialists, making agents well placed to co-ordinate supports.
 - **The competitive agent model promotes innovation** in developing, trialling and implementing tailored approaches for injured workers in a proactive way... The scale benefits of [the agent's] global knowledge in person-centred claims management, including the ability to adopt best practice in other schemes in which agents operate, offers Victoria valuable insights to enhance the system.
 - **Agent business models are agile**, and this enables the efficient allocation of resources to meet evolving trends in workplace injuries.

41 See, eg, Submissions DP15 (ARPA), DP27 (Gallagher Bassett), DP58 (Xchanging).

42 See, eg, Submission DP27 (Gallagher Bassett).

43 See DP27 (Gallagher Bassett), DP55 (WorkSafe agent, name withheld), DP58 (Xchanging), DP59 (WorkSafe agent, name withheld).

Improving the experience of injured workers

- **Multiple agents spread the risks** associated with managing one of the largest long-tail workers compensation systems in Australia, and provides a safety net for the scheme future viability.⁴⁴
- 9.52. The argument that the agent model promotes innovation was well expressed by an agent in its submission:
- Agents in Victoria’s scheme exist in a competitive market. Compared to managing complex claims in-house, the multi-Agent Model fosters innovation and specialisation in how complex claims are managed.⁴⁵
- 9.53. In its submission in response to the discussion paper, WorkSafe made a similar point:
- An in-house model for delivery of services and recovery support to injured workers enables direct oversight and control of quality, continuity of service and values alignment. However, these benefits must be weighed against any potential reduction in innovation inherent in a competitive market.⁴⁶
- 9.54. By contrast, a submission from the Insurance Work and Health Group, Monash University argued that:
- Innovation diffusion is slowed and siloed within individual agents to enable commercial advantage, rather than being distributed across the scheme for the benefit of a greater number of workers.⁴⁷
- 9.55. Finally, I note that Ryan Guppy, Chief of Return-to-Work Partnerships, Department of Labor & Industries (State of Washington) informed the Review that innovations don’t depend on whether an organisation is public or private. Mr Guppy pointed out that leadership, proper hiring, and organisational culture are some of the important contributing factors for innovations to emerge and that there are plenty of private sector companies that are not innovative.⁴⁸
- 9.56. The evidence I have heard about publicly owned schemes such as the Transport Accident Commission and the Accident Compensation Corporation (NZ) supports Mr Guppy’s contention.⁴⁹ Having said that I accept that the agents too have

44 DP59 (WorkSafe agent, name withheld) 4 (emphasis in original). See also 22-24.

45 DP59 (WorkSafe agent, name withheld) 22. See also DP55 (WorkSafe agent, name withheld) 10. I note that the 2013 review of the Agent model described the competitive pressure between WorkSafe’s Agents as ‘unusually sharp and timely’: WorkSafe, *Agency Model Review* (Report, 2013) 52 (‘WorkSafe 2013’).

46 Submission DP57 (WorkSafe) 4.

47 Submission DP36 (IWHG Monash) 7.

48 Consultation 23 (Dept L&I, Washington), comment on consultation notes from Ryan Guppy.

49 Some of the innovations implemented by TAC and ACC are examined in Chapter 7 at 7.100–7.116 and 7.133–7.136 respectively.

implemented some innovative ways of managing complex claims in conjunction with WorkSafe in recent years..⁵⁰

Why agents should not manage complex claims

9.57. The second category of submissions contended that, based primarily on the evidence of their past performance, agents should not manage complex claims in future.

9.58. For example, at the conclusion of his very detailed submission to the Review, Mr Alan Clayton, whose experience of workers' compensation schemes dates back at least to the Cooney Inquiry of 1983, stated that:

...it is abundantly clear ... that ... the agency model is a completely flawed approach. It is one that, because of the inherent tensions associated with the principal-agent problem, is probably not capable of being effectively managed into being a viable vehicle for quality scheme operations..⁵¹

9.59. This view was supported by a number of other submissions. For example, the joint submission of members of the Review's expert panel was that the abolition of the agent model:

...carries the best opportunity for long term coordinated practices in case management ... [and] is needed to support the required change in attitude, systems, collaboration, and implementation of evidence informed practices..⁵²

9.60. The Injured Workers Support Network, which is supported by the Victorian Trades Hall Council, is a group of injured workers. This group also draws on the individual experiences of its members to campaign for policy changes to improve the treatment of injured workers across Victoria. In its submission to this Review, the Injured Workers Support Network detailed numerous examples of injured workers' lived experience with the system and how the system had failed them.

9.61. The Injured Workers Support Network submitted that:

Nothing short of wholesale reform and the removal of authorised agents is needed to ensure that going forward injured workers do not have to endure the treatment or trauma that we have suffered..⁵³

⁵⁰ See Chapter 7 from 7.140.

⁵¹ Submission DP3 (Alan Clayton) 24.

⁵² Submission OP7 (Expert academic and medical group) 7.

⁵³ Submission DP35 (IWSN) 8.

Improving the experience of injured workers

- 9.62. Finally, in a submission supported by many individual unions, the Victorian Trades Hall Council submitted that:

The WorkCover system needs to be radically overhauled. Private agents must be completely removed and have no role whatsoever in Victoria's workers' compensation scheme.⁵⁴

- 9.63. The key reasons provided in submissions for removing complex claims management from agents are described below.

- 9.64. **The profit-driven motive of agents is incompatible with effective management of complex claims**—a number of submissions highlighted that a corporation's key focus is to make a profit, suggesting that the need to minimise costs leads to compromised decision-making.⁵⁵ This was contrasted with the motivation of a public entity such as WorkSafe, which is not required to make a profit.

- 9.65. Uniting Victoria and Tasmania, one of the largest community service organisations in Victoria, clearly summarised the view expressed in many submissions:

The current scheme is based on the premise that private insurance, motivated by profit, offers choice to employers. The conventional view is that competition improves services. The counter argument is it is a race to the bottom on costs and level of service in order to generate greater profit and lock in a vested interest.⁵⁶

- 9.66. Some submissions contrasted the agent model with schemes such as the TAC and the National Disability Insurance Scheme. The Victorian Trades Hall Council suggested that the TAC, as a 'social insurer', provides a good model and that workers' compensation claims should be managed in a similar way:

The Transport Accident Commission (TAC) is an example of a model that centres the needs of the injured person, through a public case management system. It is a Victorian Government owned organisation that was established to pay for treatments and benefits for people injured in transport accidents, promote road safety and help Victorians get their lives back on track.⁵⁷

- 9.67. **The current model is not worker-centric because the 'client' is the employer, rather than the injured worker**—A number of submissions suggested that the agent model cannot be worker centred because the 'client' for agents is the

54 Submission DP54 (VTHC) 10.

55 See, eg, Submissions DP11 (ALA), DP7 (AMIEU), DP22 (Craig's Table), DP45 (Slater and Gordon Lawyers), DP51 (Uniting Victoria), DP54 (VTHC).

56 Submission DP51 (Uniting Victoria).

57 Submission DP54 (VTHC).

Improving the experience of injured workers

employer, rather than the worker.⁵⁸ Agents are competing for the business of employers who are able to change agents but workers have no choice of agent.

9.68. The Australian Meat Industry Employees Union, in a view that was supported by a number of unions, stated:

[p]rivate agents must be completely removed and have no role whatsoever in Victoria's workers' compensation scheme. It must be rebuilt by placing best practice, care and a stronger emphasis on the injured worker returning to work on the advice of their treating practitioner, at its centre.⁵⁹

9.69. **Bringing complex claims management into WorkSafe would provide undivided accountability**—Some people told the Review that a benefit of managing claims within WorkSafe would be that it provides undivided accountability. Slater and Gordon Lawyers suggested 'it is difficult to ensure a consistent 'worker-centric' culture with multiple agents'.⁶⁰ Submissions suggested a range of other benefits in moving complex claims to WorkSafe including:

- greater consistency in decision-making;
- a worker-centric culture and approach to claims management because the profit or the achievement of financial incentives is not a motivation for decision-making; and
- the recruitment, retention and training of quality case managers, which would result in quality case management, decision-making and outcomes for injured workers.⁶¹

Options paper

9.70. In December 2020, I released an options paper for targeted consultation with stakeholders.⁶² The paper built on the feedback from submissions to the discussion paper to provide seven options for who should manage complex claims.

9.71. The options were:

- **Option 1**—the status quo/ baseline option. All workers' compensation claims, whether 'complex' or otherwise, would continue to be managed using the outsourced 'agent model'.

⁵⁸ See, eg, Submissions DP1 (ACCS), DP7 (AMIEU), DP30 (HACSU), DP54 (VTHC).

⁵⁹ Submission DP7 (AMIEU).

⁶⁰ Submission DP45 (Slater and Gordon Lawyers).

⁶¹ See, eg, Submissions DP11 (ALA), DP45 (Slater and Gordon Lawyers).

⁶² Peter Rozen, *Victorian Workers' Compensation System: Independent Review into the Agent Model and the Management of Complex Claims* (Options Paper, December 2020) 25 ('Options Paper').

Improving the experience of injured workers

- **Option 2**—each agent would be required to establish a dedicated complex claims unit to manage complex claims.
 - **Option 3**—WorkSafe would appoint a single, specialised agent to manage complex claims.
 - **Option 4**—WorkSafe would establish a dedicated complex claims unit to manage complex claims. Claims would be triaged by agents.
 - **Option 5**—WorkSafe would establish a dedicated complex claims unit to manage complex claims. Claims would be triaged by WorkSafe.
 - **Option 6**—would introduce a hybrid claims management model between WorkSafe and agents with an increased decision-making and oversight function for WorkSafe.
 - **Option 7**—would abolish the ‘agent model’ entirely, with all claims (including complex claims) managed directly by WorkSafe.
- 9.72. The options paper provided a more detailed description of the options, how they would work and the potential advantages and disadvantages of each option. The paper asked if there was another option that had not been identified by the Review. No one who made a submission identified such an option. A copy of the options paper is reproduced at Appendix F.

Responses to the options

- 9.73. **Option 1—Only one submission** to the options paper, from Australian Industry Group, supported the status quo. It submitted in favour of 'a version of status quo with increased oversight by WorkSafe'. It favoured this approach over the establishment of specialised units within agents because 'early supportive contact between the worker, and the agent as necessary, is a major contributor to achieving better claim outcomes'. It submitted that:

This cannot be achieved by just establishing specialised units; it can only be achieved by every front-line staff member knowing that their first priority is to achieve meaningful early contact...⁶³

- 9.74. **Option 2—Five responses to the options paper submitted** that dedicated complex claims units to manage complex claims within agents was the preferable approach. Two of these responses came from agents, one came from the medical and rehabilitation sector, and two from employer peak bodies. Two additional agents favoured a hybrid of Option 2 and Option 6.

63 Submission OP1 (Ai Group) 1.

- 9.75. The main reasons provided in support of Option 2 were:
- continuity of care for the worker and reducing delays and disruption for the worker and their employer;⁶⁴
 - a multiple agent model diversifies and minimises scheme risk and provides a safety net for the scheme;⁶⁵
 - a multiple agent model encourages competition and innovation;⁶⁶ and
 - the costs associated with creating a dedicated complex claims team within agents, who already have well established systems, resources and expertise would be minimal, as compared to Options 3, 4, 5, 6 and 7.⁶⁷
- 9.76. Two agents considered that Option 2 should be blended with Option 6.⁶⁸ Under this proposal, agents would establish a dedicated claims unit to manage complex claims and provide end-to-end claims management. WorkSafe would become actively involved in key entitlement decisions. The submissions suggested that this would improve scheme-wide consistency of decision making.
- 9.77. An occupational rehabilitation provider submitted that Option 2 would not be effective because ‘agents have a history of mismanagement of complex claims’.⁶⁹ Similarly, a joint submission of members of the Review's expert panel cautioned against Option 2, noting that it would only be another attempt to improve claims management within the existing agent model that has been criticised in successive reports.⁷⁰
- 9.78. **Option 3—No submissions to the options paper supported** the appointment of a single, specialised agent to manage complex claims.
- 9.79. **Option 4—No submissions to the options paper supported** a dedicated unit for complex claims set up in WorkSafe but with agents continuing to triage. Submissions that supported a dedicated unit for complex claims within WorkSafe supported Option 5 in which WorkSafe, rather than agents, triage claims.
- 9.80. **Option 5—Two submissions (from the Australian Lawyers Alliance and Slater and Gordon Lawyers) supported** the establishment of a dedicated unit for

64 See, eg, Submissions OP4 (ARPA), OP8 (Gallagher Bassett), OP15 (WorkSafe agent, name withheld), OP16 (WorkSafe agent, name withheld).

65 Submission OP15 (WorkSafe agent, name withheld).

66 See, eg, Submissions OP15 (WorkSafe agent, name withheld), OP13 (VFF), OP12 (VACC).

67 Submission OP12 (VACC).

68 Submissions OP15 (WorkSafe agent, name withheld), Submission OP8 (Gallagher Bassett).

69 Submission OP9 (Occupational rehabilitation provider, name withheld) 3.

70 Submission OP7 (Expert academic and medical group).

complex claims set up in WorkSafe Victoria, with WorkSafe to perform triage of all claims. Australian Lawyers Alliance supported this option or Option 6 as a short to medium term step with a move to WorkSafe managing all claims (Option 7) in the medium to longer term. The Australian Lawyers Alliance considered that Option 5 or 6 could:

- ensure a culture which is based on worker-centred philosophies and processes;
- address the issues raised in the Ombudsman's reports; and
- would not endanger scheme viability.⁷¹

9.81. Slater and Gordon Lawyers supported establishing a dedicated unit for complex claims in WorkSafe (where WorkSafe triages claims) because it would remove some financial incentives. It preferred the approach of having WorkSafe triage claims, rather than agent triage, because it would make the transfer of claims more expedient, avoiding any delay from agents and reducing the likelihood of error in the triage system.⁷²

9.82. The Review heard strongly from many unions in submissions to the discussion paper that they preferred removing agents from the WorkCover model entirely. This view was reflected in the Victorian Trades Hall Council submission to the options paper supporting Option 7. It stated that its 'next best' option was Option 5.⁷³ It submitted that by removing complex claims from agents, Option 5 would address many of the Victorian Trades Hall Council's concerns about financial incentives, such as the incentive to delay claims.⁷⁴ The Victorian Trades Hall Council also supported WorkSafe controlling the triage process, giving it the responsibility to make sure workers are assigned to the correct stream.⁷⁵

9.83. **Option 6—Two medical and rehabilitation providers identified a standalone Option 6 as their preferred solution.**⁷⁶ As noted above, two agents supported a hybrid arrangement that included elements of Option 2, combined with Option 6.⁷⁷ The Australian Lawyers Alliance considered Option 6 to be one of its two preferred short-medium term options, alongside Option 5.

71 Submission OP2 (ALA).

72 Submission OP11 (Slater and Gordon Lawyers).

73 Submission OP14 (VTHC).

74 Submission DP54 (VTHC).

75 Submission OP14 (VTHC).

76 Submissions OP10 (RANZCP); OP3 (AMAV).

77 Submissions OP15 (WorkSafe agent, name withheld); OP8 (Gallagher Bassett).

Improving the experience of injured workers

- 9.84. An agent considered that a blended Options 2 and 6 model would provide the scheme with continuity of the agents' management of complex claims, with an increased oversight role for WorkSafe. It suggested a role for WorkSafe to provide assurance to injured workers that the agent's application of the legislative regime is correct..⁷⁸
- 9.85. The model proposed by this agent would see WorkSafe involved in decision-making at key points of the management of complex claims; at triage, initial assessment, and working with the agent at the point of a 130-week 'gateway' assessment..⁷⁹
- 9.86. Similarly, Gallagher Bassett supported a hybrid arrangement of Options 2 and 6, retaining the management of complex claims with agents and introducing a greater decision-making role for WorkSafe. It saw a potential increased role in which WorkSafe:
- Takes ownership of key decision making, including determination and endorsement of decisions, such as the 130-week decision as well as other decisions to cease entitlements and potentially initial eligibility and complex treatment requests (those that are currently mandated). Agents would continue to gather the information draft decisions and communicate the decision with the injured worker. Agents would continue to gather the information and draft the decision for WSV to sign off, providing WSV greater oversight and to ensure that information gathered is appropriate and timely. Agents would also continue to communicate the decision with the injured worker, but with guidance and instruction from WSV to deliver consistency of communication across the Scheme..⁸⁰
- 9.87. The Royal Australian and New Zealand College of Psychiatrists Faculty of Forensic Psychiatry, Victorian Sub-committee and the Australian Medical Association of Victoria both supported Option 6. Both agencies believed the option would be the least disruptive, would retain the role of agents and would offer more oversight of claims management by WorkSafe..⁸¹
- 9.88. **Option 7—as I described above, unions overwhelmingly supported** an option that removed agents from the WorkCover system entirely..⁸² This option was also supported by a number of members of the Review's expert panel with whom I consulted, a support organisation for injured workers (Craig's Table) and an

78 Submission OP15 (WorkSafe agent, name withheld).

79 Submission OP15 (WorkSafe agent, name withheld).

80 Submission OP8 (Gallagher Bassett) 2-3.

81 Submissions OP10 (RANZCP), OP3 (AMAV).

82 See, eg, Submissions OP14 (VTHC), OP5 (CFMEU), DP7 (AMIEU), DP30 (HACSU), DP54 (VTHC).

Improving the experience of injured workers

- occupational rehabilitation provider.⁸³ The Australian Lawyers Alliance supported Option 7 in the longer term, while preferring Options 5 or 6 in the shorter term.
- 9.89. The Victorian Trades Hall Council considered that the profit motive of private insurers is incompatible with a scheme that should provide best practice support and rehabilitation and prioritises a timely and appropriate return to work. In the Victorian Trades Hall Council's view, this means that WorkSafe needs to take a direct role in claims management.⁸⁴
- 9.90. The Victorian Trades Hall Council also noted that WorkSafe's ability and commitment to take on the CGU workload is already putting in place the infrastructure and staffing to handle complex claims: 'It is our view this strengthens our argument that Option 7 be recommended'.⁸⁵
- 9.91. Craig's Table similarly noted that removing agents from workers' compensation claims would remove the profit motive. It suggested that this would put people at the centre of every decision, policy and program related to workers' compensation.⁸⁶
- 9.92. A rehabilitation provider submitted that Options 3, 5 and 7 would all lead to improved claims management, with Option 7 being preferred. The submission highlighted successful state-run schemes in Queensland, New Zealand and the State of Washington.⁸⁷
- 9.93. There was widespread support for WorkSafe having responsibility for the management of complex claims from a wide range of organisations with extensive experience of the current scheme. For example, the Law Institute of Victoria submitted that:
- the breadth of problems identified with the Agent model cannot be addressed by merely tinkering with the current system.⁸⁸
- 9.94. The Law Institute of Victoria also considered that a claims management model in which WorkSafe manages complex claims in house is:

83 Submissions OP6 (Craig's Table), OP7 (Expert academic and medical group), OP9 (Occupational rehabilitation provider, name withheld).

84 Submission OP14 (VTHC).

85 Email from [REDACTED], Victorian Trades Hall Council to Kirsten McKillop, Director – Independent Agent Review, 1 April 2021. WorkSafe's imminent assumption of responsibility for these claims is discussed in Chapter 4.

86 Submission OP6 (Craig's Table).

87 Submission OP9 (Occupational rehabilitation provider, name withheld).

88 Submission DP39 (Law Institute of Victoria) 4.

Improving the experience of injured workers

best suited to addressing the core issues identified in the Ombudsman’s reports. It would remove the compromised motivation of the Agents and would enable the primary focus to be on the health and recovery of injured workers.⁸⁹

- 9.95. The joint submission of members of the Review's expert panel noted the focus of each of the options was ‘who’ should manage complex claims, rather than ‘how’ they should be managed. It suggested that the best way to achieve lasting change in how claims are managed is to change the ‘who’.
- 9.96. The panel supported Option 7 because in their view it provides the best chance of introducing an appropriate model of scheme delivery. It told the Review that this option ‘is needed to support the required change in attitude, systems, collaboration, and implementation of evidence informed practices.’⁹⁰
- 9.97. Table 8 summarises the responses from targeted consultation in support of each option in the options paper.

Table 8: Overview of responses to options paper

Option	Number in support	Type of stakeholder/s
One	1	Employer group
Two	5	2 Agents 2 Employer groups 1 Medical and rehabilitation
Three	0	N/A
Four	0	N/A
Five	2	2 Legal*
Six	3	1 Legal* 2 Medical and rehabilitation
Seven	6	1 Legal* 2 Unions 2 Others 1 Medical and rehabilitation

89 Submission DP39 (Law Institute of Victoria) 7.

90 Submission OP7 (Expert Panel) 7.

Option	Number in support	Type of stakeholder/s
Two + Six	2	2 Agents

* The Australian Lawyers Alliance submitted three preferred options: Options 5 or 6 in the short-medium term, and Option 7 in the longer term. These preferences are recorded in each of the options in this table, meaning the Alliance’s preferences are counted three times.

Option 5 is most likely to address the root causes of the problems with the agent model

- 9.98. I have carefully considered all of the submissions which responded to the options paper. Ultimately, I have determined that the option most likely to maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme is Option 5. This will see WorkSafe directly managing complex claims in a complex claims unit after triaging claims.
- 9.99. Under my preferred model, WorkSafe will make an initial assessment of all claims and retain the ones it assesses as complex or at risk of becoming complex. The remaining claims will be transferred to one of the agents to manage in accordance with WorkSafe's requirements. One such requirement will be that each claim be constantly monitored for signs of complexity or potential complexity. On the occurrence of certain agreed events (such as the development of a secondary mental injury), the management of the claim will be returned to WorkSafe.
- 9.100. There are three principal reasons why I have determined that Option 5 is to be preferred.
- 9.101. The first is that, among the available options, it is the most likely to address the root causes of the problems with complex claims management identified in the two reports by the Ombudsman and summarised in the Terms of Reference.⁹¹
- 9.102. It is axiomatic that any new model for managing complex claims must address the root cause or causes of the problems identified by the Ombudsman. Unless the new model does this, the undoubted disruption of moving to a new claims management system will not be justified.

⁹¹ Terms of Reference, paras 7-9.

9.103. It is therefore necessary to understand what those root causes are. The discussion paper sought submissions on this question and most of those who provided responses expressed a view.

9.104. Many submissions identified the agents' profit motive as at least one of the root causes. For example, a joint submission by the Insurance Work and Health Group, Monash University stated:

In our view the root cause of the problems identified by the Ombudsman lies in the implementation of the so-called 'insurance model' of compensation, coupled with the privatisation of scheme delivery to for-profit organisations and the requirement to deliver legislation that was designed in the mid 1980's based on a biomedical model of injury recovery.⁹²

9.105. The response from the Australian Nursing and Midwifery Federation was typical of submissions from trade unions and plaintiff lawyers.⁹³ It submitted that the root causes 'stem from a number of primary issues associated with the set-up of the claims management scheme, being:

- a) The use of 'for profit' companies, with a primary focus on making money, to manage a process which, by its very nature, is unlikely to provide the dividends desired, if done ethically;
- b) The use of insurance agents, who treat dealing with injured workers as though they are dealing with a claim for car insurance, and have their internal KPIs and culture set up in this way;
- c) The inherent conflict whereby the employer pays the premium, and is the 'client', and the agent is supposed to work in the best interests of the workers, which may be in direct conflict with the desires of the client;
- d) The lack of individualised claims management for workers, which recognises their biopsychosocial factors as critical to the way their claim, recovery and rehabilitation will progress;
- e) The management of injured workers' claims by agents in a way that ensures convenience for their employer, rather than focusing on the recovery, rehabilitation and return to work for the injured workers;

⁹² Submission DP36 (IWHG Monash) 6-7.

⁹³ See, eg, Submissions DP7 (AMIEU), DP45 (Slater and Gordon Lawyers), DP54 (VTHC).

Improving the experience of injured workers

- f) The primary focus of the workers compensation scheme on collecting premiums, rather than supporting the recovery and rehabilitation of workers who are injured in the course of their employment’...⁹⁴

9.106. The submission by the Australian Psychological Society which represents over 24,000 psychologists, many of whom work within compensation systems, contended that ‘the most critical causal factors are:

- agent profit focus;
- unnecessary adversarial agent behaviour, which in turn leads to counter-claim-behaviour by the legal representatives of injured workers;
- lack of effective system oversight;
- cultural complicity of various parties in poor decision making and outcomes; and
- [Independent Medical Examiner] and [Occupational Rehabilitation Consultant] complicity in poor claims management’...⁹⁵

9.107. By contrast, the agents and some employers saw the causes of the problems identified by the Ombudsman quite differently.

9.108. Xchanging submitted that the root causes are:

The industry sets a high bar on decision making, but there is a tension in the system because the tests require subjective judgement, for example tests of ‘reasonableness’ and ‘indefinitely’. This can cause inconsistency, ambiguity, uncertainty and, in some cases, errors...⁹⁶

9.109. Gallagher Bassett also identified legislative capacity as a root cause. It drew attention to the assessment it must make under section 163 of the WIRC Act to determine whether a worker has ‘no current work capacity’. As explained in Chapter 3, this assessment is central to entitlement of the worker to ongoing weekly payments of compensation. According to Gallagher Bassett, this has been compounded by aspects of the scheme design including, that it:

remains process focused with Agent staff limited in their ability to customise service delivery for workers with complex claims to the extent that would be desirable due to restrictions in WorkSafe policy rooted in cost management or due to legislative constraints...⁹⁷

94 Submission DP4 (ANMF) 33-34; see also DP7 (AMIEU), DP11 (ALA), DP16 (ASU), DP45 (Slater and Gordon Lawyers), DP54 (VTHC).

95 Submission DP14 (APS) 7.

96 Submission DP58 (Xchanging) 19.

97 Submission DP27 (Gallagher Bassett) 36.

Option 2—can the agents be part of the solution?

- 9.110. The second reason why I favour Option 5 is that, although it carries some risks, there are fewer risks associated with it than either Options 2 or 7 which I consider to be the only other options that are feasible.
- 9.111. Option 2, under which agents would manage complex claims in their own complex claims units requires a leap of faith that is not supported by the evidence. As detailed in Chapter 5, the agent model has been the subject of eight critical reviews in the last two decades. In the last of those reviews, in 2019, the Ombudsman concluded that 'piecemeal changes have proven unsuccessful' in tackling the widespread problems she had identified with the agent model.⁹⁸
- 9.112. The establishment by the agents of complex claims units would be a further piecemeal change. It is to be recalled that in 2002 WorkSafe required each of its agents to manage complex claims in multi-disciplinary teams. The evidence suggests that the results of this initiative have been mixed at best. Why would a complex claims unit succeed where a multi-disciplinary team has not?
- 9.113. The agents' submissions need to be viewed within the context of the agent model as it has operated over the last 36 years. The obvious question to ask is: if the agents were capable of better or best practice management of complex claims, why haven't they been doing that until now? And why has it taken two highly critical reports by the Ombudsman and the prospect of losing a significant proportion of their work, for the agents to propose such an approach to complex claims management?
- 9.114. I accept that the answer to these questions is in part because the agents have been operating the claims management model that WorkSafe has wanted them to operate—one that places a premium on the financial viability of the scheme as a whole and incentivises and financially rewards the removal of injured workers from the scheme. Person-centred case management has not been rewarded by WorkSafe. However, part of the answer is that the agents as profit-driven enterprises are not suited to the sort of social insurance outcomes that are needed.
- 9.115. In this context, a joint submission from members of the Review's expert panel noted that:

⁹⁸ Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019) 219 ('Victorian Ombudsman 2019').

‘...there have been multiple ultimately unsuccessful attempts to improve claims management within the claims agent model’.⁹⁹

- 9.116. This is clearly established on the evidence discussed in Chapter 5. Attempts to improve the experience of workers by modifying the agent model can be traced back at least to the McKinsey & Company Report of 2001.¹⁰⁰ However, the problems with the agent model appear to go back to the beginnings of the scheme. For example, in his 2002 report which examined claims management by WorkSafe, the Auditor-General noted that ‘key claims management information compiled by the [Victorian WorkCover] Authority highlighted that this aspect of the WorkCover scheme has been performing poorly for several years’.¹⁰¹ Similarly, a report prepared by WorkSafe in 2013 noted that, dating back to 1985, there had been several ‘radically different agency models’ all of which except one had been ‘abandoned as failures’.¹⁰²
- 9.117. In Chapter 5, I noted that the implementation of the recommendations made by the Ombudsman in her 2016 report did not improve in any sustainable manner the management of complex claims. If anything, the situation deteriorated as the Ombudsman observed in her 2019 report.¹⁰³
- 9.118. The Ombudsman explained in her 2019 report that the reason she chose to revisit the issue of the management of complex claims was that her office continued ‘to receive many complaints about WorkSafe and its agents, with nearly 700 complaints received in 2017-18 and about 800 in 2018-19’.¹⁰⁴

What has been the effect on complaint numbers of the 15 recommendations made in the December 2019 report?

- 9.119. The Ombudsman reported on progress in the implementation of her 15 recommendations in a report dated June 2020.¹⁰⁵ The report recorded the Ombudsman's satisfaction with the work WorkSafe had done in implementing the recommendations.¹⁰⁶ The report also recorded the complaints about

99 Submission OP7 (Expert academic and medical group) 8.

100 McKinsey & Company, ‘Improving Return to Work Outcomes Through Claims Excellence: Recommendations’ (Presentation, 27 July 2001) 4.1-4.4.

101 Victorian Auditor-General's Office, *Management of claims by the Victorian WorkCover Authority* (Audit report, 2001) 34 (emphasis added).

102 WorkSafe 2013 (n 45) 8.

103 Victorian Ombudsman 2019 (n 98) 219.

104 Victorian Ombudsman 2019 (n 98) 7.

105 Victorian Ombudsman, *Ombudsman's Recommendations - Third Report* (Report, June 2020) (‘Victorian Ombudsman 2020’).

106 Victorian Ombudsman 2020 (n 105) 72-73.

WorkSafe and its agents that the Ombudsman continued to receive up to March 2020 which were only slightly down on the monthly totals in the period leading up to the release of the report in December 2019.¹⁰⁷ I asked the Ombudsman for more up to date complaints data and what her office provided is depicted in Figure 9 below. It can be seen that, while there was a drop in complaints in early 2020, the numbers since are broadly similar to the numbers of complaints that the Ombudsman was receiving prior to the publication of the 2019 report.

9.120. While I accept that the number of complaints is only one measure of the impact of the December 2019 report, this data does call into question whether much is changing on the ground for workers with complex claims. When combined with submissions I have received which suggest that little has changed in the experience of those workers,¹⁰⁸ this gives me little confidence that the agent model, even in a modified form, can provide the quality of case management that is needed in Victoria.

9.121. I accept a submission which argued that:

the agents have been provided with significant opportunities to address the poor behaviour and decision making, as well as culture, as a result of initially the 2016 report, and more recently the 2019 report.¹⁰⁹

9.122. As the Ombudsman put it in 2019, 'it is time for the change that makes a difference'.¹¹⁰

9.123. Figure 9 shows the number of complaints that the Ombudsman has opened about the WorkCover scheme between July 2015 and February 2021.

107 Victorian Ombudsman 2020 (n 105) 73 [Figure 7].

108 See, eg, Submissions DP11 (ALA), DP16 (ASU), DP54 (VTHC).

109 Submission DP4 (ANMF) 34.

110 Victorian Ombudsman 2019 (n 98) 5.

Figure 9: Complaints opened about WorkCover scheme by Victorian Ombudsman by month to February 2021.¹¹¹



Option 5—addresses the principal-agent problem

9.124. The third reason that I favour Option 5 is related to the second. It goes to the heart of the agent model and concerns WorkSafe's longstanding inability or unwillingness to hold its agents accountable. As noted in Chapter 5, successive reviews of the agent model have strongly criticised WorkSafe's oversight of its agents.¹¹²

9.125. Mr Alan Clayton's submission to the Review observed that a fundamental issue which militates against the agent model being an effective arrangement in workers' compensation practice is the 'principal-agent problem'.¹¹³ The submission explained that the problem is concerned with:

¹¹¹ Based on Victorian Ombudsman 2019 (n 98); email from [redacted], Victorian Ombudsman to Kirsten McKillop, Director – Independent Agent Review, 16 March 2021. Note data includes complaints about ACCS, Medical Panels, Victorian WorkCover Authority, Agents and Self-Insurers.

¹¹² For example, the Auditor-General in his 2009 review (see Chapter 5 at 5.21); the Victorian Ombudsman in 2016 (see 5.43) and again in 2019 (see 5.62).

¹¹³ Submission DP3 (Alan Clayton) 8.

... how a body ('the principal') can structure incentives so that entities ('agents') who are placed in control of resources that are not their own - with contractual obligation to use these resources in the interests of some other person or group of people - will actually perform this obligation as agreed, instead of using their delegated authority over these resources to advance their own interests rather than the interests of the principal.¹¹⁴

9.126. I have concluded that the agent model is a clear example of this problem. The successful implementation of Option 2 would require a fundamental change to the relationship between WorkSafe and its agents. In light of the historical record and the evidence before me, I have no confidence that either WorkSafe or the agents are capable of making such a change.

Option 7—should WorkSafe manage all claims?

9.127. Several submissions contended that consideration should be given to WorkSafe managing all claims, not just complex ones.¹¹⁵

9.128. For example, a joint submission of members of the Review's expert panel suggested that the abolition of the agent model and the transfer of all claims management responsibility to WorkSafe 'carries the best opportunity for long term coordinated practices in case management'. Further, this option 'is needed to support the required change in attitude, systems, collaboration, and implementation of evidence informed practices'.¹¹⁶

9.129. While I find these submissions persuasive, and am attracted to the simplicity of such a system, I have concluded that, in the short term (2021-2023), it is not feasible for WorkSafe to be responsible for all claims. WorkSafe will not have the systems in place and staff employed to provide high quality management for any more than a relatively small but growing proportion of claims. The two years during which the current agency agreement will be extended should be used by WorkSafe to establish these systems and employ the necessary staff.

9.130. A number of submissions have warned of the risks associated with a hybrid scheme under which WorkSafe manages complex claims and an agent or agents manage other claims.¹¹⁷ I acknowledge that these risks are real.

114 Submission DP3 (Alan Clayton) 8.

115 See, eg, Submissions DP7 (AMIEU), DP39 (LIV), DP54 (VTHC).

116 Submission OP7 (Expert academic and medical group) 7.

117 See, eg, Submissions OP1 (Ai Group), OP9 (Occupational rehabilitation provider, name withheld), OP11 (Slater and Gordon Lawyers).

9.131. One of the major tasks for the reviewer who conducts the statutory review of the scheme in 2024 (see Recommendation 9) will be to assess how the hybrid scheme is working and, in particular, how WorkSafe is performing in its management of complex claims. The Ministerial Review should recommend whether, based on those assessments, WorkSafe should take over the management of all claims and, if so, when that should occur and what needs to be in place for it to occur effectively.

Recommendation 3: Claims to be provided by employers to WorkSafe

The Minister for Workplace Safety should amend the *Claim for Compensation Ministerial Guidelines 2016* to require that employers provide claims to WorkSafe and not to WorkSafe's agents. This should take effect from 1 January 2023.

Recommendation 4: WorkSafe to identify if claims are complex or at risk of becoming complex

WorkSafe should implement a triage system to assess if a claim it receives is complex or at risk of becoming complex.

In this recommendation, 'complex' means that there are risk factors associated with a worker's claim that make a delayed return to work by the worker likely if those factors are not addressed.

Claims should be assessed using a biopsychosocial approach based on the individual needs of the worker and not just the likely duration of the claim.

The goal of the triage system should be to gather sufficient information about the claim to assess relevant risks. Wherever possible, this should occur within six weeks of the date of the injury. While the system may incorporate some form of automated algorithm, it should also incorporate the 'human touch'.

The triage system implemented by WorkSafe should be based on the most up to date research including the 'Best Practice Statement: Risk Factor Identification for Delayed Return to Work' published by the Insurance Work and Health Group, Monash University (April 2018).

Recommendation 5: Non-complex claims to be transferred to one of WorkSafe's agents

A claim that WorkSafe assesses as not complex and not at risk of becoming complex should be transferred to an agent for management.

Recommendation 6: Agents to assess for complexity every 13 weeks

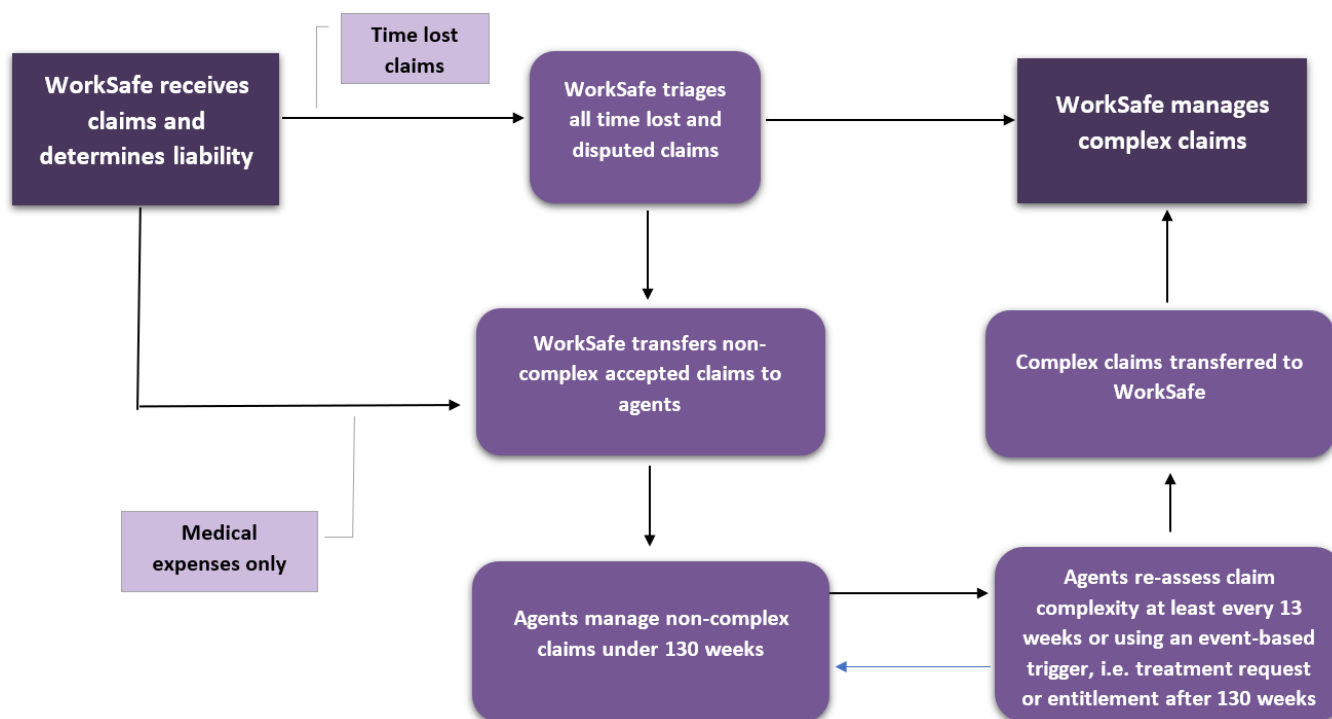
A claim transferred to agents as non-complex should be reassessed by the agent if the claim is still open after 13 weeks. The agent should assess if the claim has become complex or is at risk of becoming complex. The same assessment should be made every 13 weeks while the claim remains open.

This assessment should be made using the same methodology developed by WorkSafe to assess claims for complexity (Recommendation 4) and by agent staff approved by WorkSafe to make such assessments.

Any claim that is assessed as being complex or at risk of becoming complex is to be transferred forthwith back to WorkSafe for its management.

9.132. Figure 10 shows the recommended new claims management process for identifying, triaging and managing complex workers' compensation claims.

Figure 10: New process diagram



A paradigm shift in culture—what does WorkSafe need to do to perform this new role to a high standard?

9.133. A submission from Dr Robyn Horsley, an occupational physician with extensive experience of the Victorian workers' compensation scheme, who is also a member of the WorkCover Advisory Committee, pointed to the challenges that WorkSafe will face in assuming direct management of complex claims:

Changing the current Agent model will not necessarily improve the management of potential complex claims (biopsychosocial definition). The inherent issues require a paradigm shift in culture, with the focus changing to person centred case management for early identified potentially complex cases, with key personnel involved, having the identified skills, experience and training to manage such claims effectively.

In addition, the appropriate resources and models of measuring performance will need to be modified.¹¹⁸

9.134. Slater and Gordon Lawyers explained that its support for Option 5 in the options paper:

¹¹⁸ Submission DP25 (Dr Robyn Horsley) 6.

Improving the experience of injured workers

... should not be interpreted as absolute support for the actions of WorkSafe in administering the workers' compensation scheme. If Option 5 is implemented (or indeed any option which increases the role of WorkSafe in handling and processing complex claims) it is essential that there is an appropriate framework and accountability in place to combat issues such as those identified by the Ombudsman in her 2019 report, including acting in an 'unjust and wrong' manner with respect to decision making and failing to address systematic issues and unreasonable agent decisions.¹¹⁹

- 9.135. I agree. As noted in Chapter 5, the Ombudsman was highly critical of both WorkSafe and its agents in her 2016 and the 2019 reports. The 2019 report questioned whether WorkSafe, as the principal, 'feels beholden to the agents'.¹²⁰ This suggests that the tail has been wagging the dog rather than the other way around. This must change.
- 9.136. However, for five reasons, the challenges faced by WorkSafe should not be overstated.
- 9.137. First, as discussed in Chapters 6 and 7 above, there is a great deal of experience of other state-run compensation schemes upon which WorkSafe can draw.
- 9.138. Secondly, there is an extensive body of research in Australia and overseas in relation to best practice case management, especially of mental injury claims that can guide WorkSafe. A number of the contributors to that research have made submissions to this Review and all have expressed a preparedness to assist WorkSafe. Most of these submissions are available on the website as a record of the work of this Review.
- 9.139. Thirdly, as the submission from Dr Horsley quoted above demonstrates, WorkSafe's own advisory committee has members with extensive experience upon which WorkSafe can draw. In the next chapter I make a recommendation aimed at broadening the advice that WorkSafe receives which, if implemented, should also assist WorkSafe in the making the necessary 'paradigm shift' (Recommendations 10 and 11).
- 9.140. Fourthly, WorkSafe's agents have in recent years, and largely in response to the Ombudsman's reports, been trialling different case management approaches especially for mental injuries.¹²¹ Some of these trials have been conducted together with WorkSafe while others have been unilateral. In their submissions to

119 Submission OP11 (Slater and Gordon Lawyers) 4.

120 Victorian Ombudsman 2019 (n 98) 222.

121 Some of these trials are described in Chapter 7 from 7.140.

this Review, those agents have expressed a desire to assist WorkSafe in this regard, an offer that WorkSafe should take up in a strategic manner.

- 9.141. Finally, and perhaps most importantly of all, in the course of conducting this Review, I have observed a real commitment from WorkSafe's Chief Executive, Mr Colin Radford, to improve WorkSafe's performance generally and specifically in relation to complex claims management. This commitment is evident in both the constructive and honest response by Mr Radford to the Ombudsman's 2019 report, the submission he made to this Review and the extent to which Mr Radford and his staff have gone out of their way to assist me in the conduct of my Review.

Transition challenges for WorkSafe

- 9.142. I have been transparent in my consideration of a model of complex claims management with WorkSafe directly managing complex claims. This was flagged in the discussion paper released in August 2020 and was the key feature of both Options 4 and 5 in the options paper released in December 2020.

- 9.143. As noted above, I have consulted extensively with senior officers at WorkSafe including with its Chief Executive. At no point in the course of the Review has WorkSafe told me that it would be incapable of implementing such a change.

- 9.144. However, in its submission to the Review, WorkSafe's Chief Executive explained that

... extensive transition planning would be required to move to an in-house service delivery model for injured workers with complex needs. WorkSafe estimates that a lead time of at least 18 months would be needed to enable workforce planning, recruitment and training of staff as well as to ensure availability of premises and infrastructure. This would also be dependent on existing (or exiting) agents maintaining service delivery throughout this period.¹²²

- 9.145. In Chapter 7, I referred to the serious problems associated with recent reforms to the New South Wales workers' compensation scheme (icare) in recent years. A 2019 independent review of those reforms by Janet Dore identified the rushed implementation of the changes as a contributor to the problems that were experienced. The Dore Report expressed a concern that 'the timetable was apparently necessitated by impending expiry dates of agent contracts'.¹²³

122 Submission DP57 (WorkSafe) 5.

123 Janet Dore, *Independent Reviewer Report on the Nominal Insurer of the NSW Workers Compensation Scheme* (Report, 2019) 66.

Improving the experience of injured workers

9.146. History cannot be allowed to repeat itself. These lessons must be learned.

9.147. There is a balance to be struck—between the urgent needs that are apparent from the Ombudsman’s reviews and the many injured workers and their representatives consulted during this Review—and the need to ensure that any changes are implemented in an orderly and effective manner.

9.148. Mr Alan Clayton concluded that:

‘Although there would be transitional costs in moving to a different form of system, these costs, I believe, pale into insignificance compared with the ongoing social and economic costs of maintaining the present dysfunctional system and the benefits that would flow from moving to a well-managed scheme structured according to better (if not best) practice arrangements internationally’.¹²⁴

9.149. Submissions also make the point that WorkSafe can’t achieve this change by itself; stakeholder commitment is vital. The WorkCover Advisory Committee, or whatever replaces it as a source of advice to WorkSafe, will have a key role to play in the transition in the years ahead.

9.150. While WorkSafe will no doubt face challenges in adapting to the new role proposed by this Review, it will also have great opportunities. As a submission to the Review put it, WorkSafe has a chance to 'lead the way to a more effective system'.¹²⁵ Further, as noted above, there is no need for WorkSafe to 're-invent the wheel'—there is already substantial existing research available to support WorkSafe in its transition to a health-focused workers' compensation scheme supported by best practice in claims management.

124 Submission DP3 (Alan Clayton) 2.

125 Submission DP14 (APS) 7.

Staffing the Complex Claims Unit

Recommendation 7: WorkSafe to establish a Complex Claims Unit

WorkSafe should establish a Complex Claims Unit by 1 January 2022 to manage claims that it assesses are complex or at risk of becoming complex.

The Complex Claims Unit should manage claims having regard to the individual needs of the worker and using a biopsychosocial approach.

The goals of the Complex Claim Unit will be to:

- pro-actively identify appropriate and timely interventions for the claim to maximise the prospects of the worker being restored to their pre-injury lifestyle, including employment;
- ensure that those interventions are implemented for as long as the claim is open;
- pro-actively communicate with the worker, treating health providers, the employer and any other relevant parties; and
- ensure the claim is otherwise administered in accordance with the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)*.

Recommendation 8: Staffing the Complex Claims Unit

WorkSafe should staff its Complex Claims Unit with appropriately qualified, trained and experienced staff. In establishing the Complex Claims Unit, WorkSafe should:

- create job descriptions that promote the recruitment of appropriately skilled staff with a person-centred, culturally competent approach;
- determine appropriate team and managerial structures;
- develop a broader recruitment strategy; and
- develop best practice training, coaching, mentoring and performance management for staff.

Case manager capability and turnover

- 9.151. The evidence before this Review indicates that recruitment for claims managers should focus less on processing and technical expertise and more on 'soft skills' and a person-centred approach.¹²⁶ 'Soft skills' in this context include strong communication skills, the ability to collaborate with diverse stakeholders, empathy, resilience, emotional intelligence, motivation and a willingness to be coached on performance.¹²⁷
- 9.152. A claims manager should be 'proactive, able to seek the expert, evidence-based advice they require and then make decisions on injury management or rehabilitation'.¹²⁸
- 9.153. In contrast to these qualities, I have repeatedly heard that case managers in the Victorian scheme are reactive and process-focused; there are delays with seeking expert opinions; and policies do not empower case managers to make decisions promptly.
- 9.154. Safe Work Australia's best practice framework for the management of psychological claims recognises the critical role of staff capability in recovery outcomes for workers. It states that best practice claims management requires:
- the right individuals in the claims management role;
 - an effective team structure well-supported by skilled team managers; and
 - organisational practices that provide appropriate resources and structure.¹²⁹
- 9.155. The framework notes that best practice claims management relies on:
- appropriate case-loads and case managers with the ability to identify the limits of their capability to maintain appropriate claims management activity for their portfolio;
 - a team with varied backgrounds where members are a good fit to complement one another's strengths and weaknesses;
 - access to specialist multidisciplinary technical resources; and
 - leadership with even stronger interpersonal skills, ensuring optimal management of the team through proactive support and skill enhancement.¹³⁰

126 SuperFriend and Safe Work Australia, Taking Action (n 18) 23–24.

127 SuperFriend and Safe Work Australia, Taking Action (n 18) 25.

128 SuperFriend and Safe Work Australia, Taking Action (n 18) 23.

129 SuperFriend and Safe Work Australia 'Taking action: Action Area Two' (Guide, 2019) 6 ('Action Area Two'); SuperFriend and Safe Work Australia, Taking Action (n 18) 23–28.

130 SuperFriend and Safe Work Australia, Taking Action (n 18) 24–26.

Improving the experience of injured workers

- 9.156. Staff recruitment processes should assess a person's fit for a role based on the overall balance of knowledge, skills and attributes results in enhanced job performance and overall productivity. This would improve job satisfaction and increase retention of skilled staff.¹³¹
- 9.157. Several submissions illustrated the need for cultural capabilities in claims managers. Submissions from unions described challenges for their culturally diverse members who may have difficulties with:
- communicating with others in the claims process;
 - confidence and understanding the scheme;
 - engaging in processes or providing feedback; and
 - impacts on accessing treatment and return to work.¹³²
- 9.158. The Health and Community Services Union stated that the current case management system has an '[i]nability to accommodate the specific and individual needs of workers from diverse cultural and linguistic backgrounds'.¹³³ Medical Panels supported the need to direct resources toward the rehabilitation of culturally and linguistically diverse groups.¹³⁴ The ACC in New Zealand described the importance of front line capability to appropriately communicate and accommodate multicultural considerations.¹³⁵
- 9.159. Safe Work Australia's best practice framework's evidence review suggests that at an individual level, case managers should:
- be the single point of contact for workers and employers throughout the life the claim;
 - deliver person-focused case management, taking a biopsychosocial view of work and recovery outcomes to empower the worker to actively engage in their planning and recovery;
 - have suitable tools, resources (personal, organisational and scheme-level) and delegations to deliver case management.¹³⁶
- 9.160. At an organisational level, optimal claims management teams:

131 SuperFriend and Safe Work Australia, Action Area Two (n 129) 13-17; SuperFriend and Safe Work Australia, Taking Action (n 18) 23-28.

132 See, eg, Submissions DP7 (AMIEU), DP12 (AMWU), DP30 (HACSU).

133 Submission DP30 (HACSU) 5.

134 Consultation 5 (Medical Panels and ACCS).

135 Consultation 25 (ACC NZ).

136 SuperFriend and Safe Work Australia, Taking Action (n 18) 24.

Improving the experience of injured workers

- are diverse in skills, expertise, culture, age, gender, life experience, qualifications;
- are supported and monitored for technical or personal skill gaps, burnout, and vicarious trauma;
- have close collaboration with either internal or external multidisciplinary resources (including medical, legal, employment, social and community services) to inform recovery planning and decision making;
- use appropriate systems and technology to enhance workflows and reduce administratively burdensome tasks; and
- have appropriate case-mix / workload distribution and open communication about how this should be managed..¹³⁷

9.161. In consultation I heard that case management is an emotionally demanding job. The box below, drawn from the work of academics from the Monash University Accident Centre, describes the intense challenges faced by individual case managers..¹³⁸

Emotional toll on case managers in Victoria

Evidence from surveys, consultations and empirical research point to the fact that being a case manager in the Victorian workers' compensation scheme is not an easy job.

A study exploring the 'emotional labour' of case managers in Australia illustrates significant tension in the role. Case managers are the primary interface between the scheme and parties involved in a claim. They are responsible for both front-line service and following policies supporting scheme financial viability.^{1080F¹³⁹}

Given the complexity of subject matter and vulnerability of injured workers, case managers reported being challenged by:

- workers expecting them to show emotional commitment;
- the need to maintain control of their own emotions;
- the stress of these emotional demands combined with decision making and managerial performance expectations; and
- both interpersonal and personal conflict in performing the role.^{1081F¹⁴⁰}

¹³⁷ SuperFriend and Safe Work Australia, Taking Action (n 18) 24-26.

¹³⁸ S Newnam et al, 'Stuck in the Middle: the emotional labours of case managers in the personal injury compensation system' (2016) 55(2) *Work* 347.

¹³⁹ Newnam et al (n 138).

¹⁴⁰ Newnam et al (n 138) 350-354.

This study described the conflict case managers feel when attempting to provide service to injured workers within the constraints of a compensation scheme which does not empower them to provide pro-active support.

Recruitment and training

- 9.162. The evidence suggests that WorkSafe will need to take a number of steps to perform its new role:
- reviewing and redefining job descriptions for claims managers;
 - determining appropriate team structures;
 - developing a broader recruitment strategy; and
 - enhancing training, development, coaching and performance management for claims managers.¹⁴¹
- 9.163. In relation to the development of a broader recruitment strategy, better or best practice suggests that the following needs to be addressed:
- updating human resources departments on the skills required of claims managers;
 - different recruitment strategies such as university careers fairs;
 - targeting diverse groups from graduates to mature age employees, and from a range of professional and cultural backgrounds;
 - ‘recruit for attitude, train for skill’: seek recruits with emotional intelligence and diverse life experience;
 - promoting the workers’ compensation sector as a desirable industry; and
 - working towards increased professional standing for claims managers.¹⁴²
- 9.164. Recruits should be targeted from graduates through to mature age employees, and ensure diversity of professional and personal backgrounds. The selection process should include a practical component involving case studies or role play.¹⁴³ This approach to recruitment is illustrated in the State of Washington's approach to capability described in Chapter 7 at 7.121.
- 9.165. A key factor in staff retention is alignment between the individual and organisation of values, core objectives, effective communication, diversity and

141 SuperFriend and Safe Work Australia, Taking Action (n 18) 27; see also Submission DP5 (Appropriate Measures) 2.

142 SuperFriend and Safe Work Australia, Taking Action (n 18) 27.

143 SuperFriend and Safe Work Australia, Taking Action (n 18) 25-27.

Improving the experience of injured workers

- inclusivity and development opportunities.¹⁴⁴ TAC is an example of this approach in action, as described in Chapter 7 from 7.108.
- 9.166. Claims management training should include technical information regarding optimal delivery of person-centred case management using biopsychosocial principles and concepts. It should also promote and enhance communication skills and evidence-based approaches to working with vulnerable workers, providers, employers and others in the scheme.¹⁴⁵
- 9.167. Evidence shows that training alone is not sufficient for behavioural change. Training must be followed by supervision, feedback and coaching to reinforce expectations.¹⁴⁶
- 9.168. Best practice assessment is rigorous and ‘includes a practical component, for example, responding to case study scenarios and role-playing conversations’.¹⁴⁷ A number of the case studies in the Ombudsman’s reports and this report could be adapted for this purpose.
- 9.169. The important point here is that WorkSafe should not automatically assume that the claims managers who have been working for its agents are necessarily the right people to perform the work as direct employees of WorkSafe. WorkSafe should, at least, conduct a rigorous assessment of their suitability having regard to the matters identified above.

Management

- 9.170. A number of members of the Review’s expert panel cautioned that a transition to direct claims management by WorkSafe will be challenging:
- Victoria has a long history of entrenched adversarial practices, and will require an experienced team to manage such a transition. There will need to be confidence that the management team has sufficient understanding of and experience in workers compensation for this public option to be implemented.¹⁴⁸
- 9.171. From the consultations I have conducted, most of WorkSafe’s senior managers appear open to WorkSafe adopting a new role in relation to complex claims. However, I was left with the impression that some of them, who have been with

144 SuperFriend and Safe Work Australia, Taking Action (n 18) 25.

145 SuperFriend and Safe Work Australia, Taking Action (n 18) 26-27.

146 SuperFriend and Safe Work Australia, Taking Action (n 18) 25-27.

147 SuperFriend and Safe Work Australia, Taking Action (n 18) 25.

148 Submission OP7 (Expert academic and medical group). Transition issues are addressed below at 12.3.

Improving the experience of injured workers

- the organisation for a number of years, may be more comfortable with WorkSafe as a contract manager than a service provider.
- 9.172. It is of the utmost importance that all of WorkSafe’s senior managers are entirely and unambiguously committed to WorkSafe’s new role.
- 9.173. The ambitious changes I am recommending will have little chance of succeeding without the commitment of WorkSafe’s Board of Management and its senior executive group. They must ensure that there are processes, policies and structures in place to support the work of those 'at the coal-face'.
- 9.174. WorkSafe will need to ensure that its management systems and its managers support its new role.
- 9.175. WorkSafe should review the roles and responsibilities of all staff involved in claims management including executive positions. All position descriptions should reflect WorkSafe’s new roles and accountabilities.

Governance—the role of the WorkSafe Board

- 9.176. WorkSafe’s Board of Management is established under section 502 of the WIRC Act. The Board ‘must give general directions as to the carrying out of the objectives and functions of the Authority’.¹⁴⁹ The Board sets the expectations that the Chief Executive and the senior management team are required to implement and be accountable for.
- 9.177. The Board will play a vital role in the transition that WorkSafe will go through over the next five years as the recommendations of this Review are implemented.
- 9.178. It will be particularly important that the WorkSafe Reform Implementation Monitor (Recommendation 22) consults with the Board and examines the minutes of its deliberations as part of the monitor’s ongoing assessment of the transition progress.
- 9.179. Equally, the WorkSafe Reform Implementation Monitor’s annual reports will be an important source of information for the Board. These reports will enable the Board to ensure that the directions it has given, and the goals it has set for the Chief Executive and the senior managers, are being met.
- 9.180. Implementing a continuous improvement framework ‘will require management commitment to resourcing the continuous improvement program, to evidence-

¹⁴⁹ WIRC Act s 502(2)(b).

based practice, to proactively developing and managing relationships with other stakeholders ...'.¹⁵⁰

- 9.181. My consultations with the New Zealand ACC, the TAC and the state-run North American schemes have left me with the strong impression that the senior managers in those schemes are very proud of their work as social insurers and are committed to improving at every opportunity.

Summary and conclusion

- 9.182. In the previous chapter, I concluded that the agent model is failing a significant proportion of Victoria's seriously injured workers.
- 9.183. In this chapter I have made recommendations for how those deficiencies should be addressed. In summary, I have concluded that there needs to be fundamental reform to the way complex workers' compensation claims should be managed.
- 9.184. I recommend that there be a staged transfer of responsibility for complex claims management from WorkSafe's agents to WorkSafe itself. I also make recommendations that will assist WorkSafe in making that transition in an orderly manner that minimises the negative impacts of the significant change.
- 9.185. I also recommended that a statutory WorkSafe Reform Implementation Monitor be appointed to oversee the complex transition process. The Monitor will have extensive powers and will report periodically to Parliament on WorkSafe's progress. The transition process is discussed in Chapter 12.
- 9.186. In the next chapter of this report, I recommend a number of changes to legislation and policy to improve the operation of the workers' compensation scheme.

'We get and totally understand that there is a process that needs to be followed by everyone, but the process has to be right and fair...'

'Susan', wife of injured worker

¹⁵⁰ SuperFriend and Safe Work Australia, Taking Action (n 18) 49.

10. Further improvements to the scheme

'Injured workers want respect, to be part of their own claim. They feel left out of their own claim'.¹

'I got injured and treated like a criminal'.

'Jason', injured worker

Key points

- Further improvements to the scheme that will complement the recommendations in Chapters 8 and 9 are identified in this chapter.
- Recommendations are made to provide for continuous improvement of the scheme, surveillance, greater worker involvement, reforms to feedback processes and the objectives of the scheme.
- Recommendations are also made to the return to work provisions in Part 4 of the WIRC Act.
- Other matters that have been raised in submissions include self-insurers and Independent Medical Examiners.

Purpose of the chapter

- 10.1. Paragraph 15(d) of the Terms of Reference requires me to inquire into and report on 'any other matters that [I] deem necessary including any potential system wide implications'. I have taken this reference to be limited to 'other matters' that are incidental to my principal functions under paragraphs 11 and 12 of the Terms of Reference which were the subject of Chapters 8 and 9.
- 10.2. I have not been asked to conduct a review of the entire workers' compensation scheme under the *Workplace Injury and Compensation Act 2013* (Vic) ('WIRC Act'). Therefore, this chapter is limited to topics raised with me in the course of

¹ Consultation 17 (Expert session 1).

consultations and system-wide matters that I consider will enhance the management by WorkSafe of complex claims.

10.3. Paragraph 16(d) obliges me to consider:

- Any relevant work that is being or has already been undertaken in this area including recent or ongoing legislative and regulatory reforms relating to the [WIRC] Act and workers' compensation system.

10.4. Further, paragraph 17 provides that, where I find the policy, legislative or regulatory framework could be improved, I 'must provide recommendations to give effect to such improvements'.

10.5. In this final chapter, I address the following matters, some of which have been touched on in earlier chapters:

- Continuous improvement of the scheme;
- Enhancing worker involvement;
- Responding to feedback and complaints;
- Self-insurance;
- Surveillance of injured workers;
- Independent medical examiners;
- The rehabilitation of injured workers, including
- employment obligation period;
- the training of return to work co-ordinators; and
- WorkSafe's return to work role.
- The objectives of the scheme.

Continuous improvement of the scheme

Regular reviews of the scheme

10.6. The historical development of the WorkSafe scheme was examined in Chapter 2. The current scheme is a version of the 'WorkCare' scheme introduced in 1985. The legislation has been amended numerous times since 1985 to give effect to the changing policy priorities of different governments. Some changes were made in response to reviews by independent agencies or by consultants engaged by WorkSafe.

10.7. Many of these changes have been ad hoc and have had the effect of increasing the complexity of an already complex scheme. By way of illustration, the original 1985 Act had 253 sections; the current Act, introduced in 2014, is nearly three

times that size. A number of the changes have been introduced to respond to a crisis in the scheme or to the recommendations of a review. An example of the former is the 1992 reform that changed the scheme fundamentally in response to the financial pressure it was under. An example of the latter is the recent Bill that intends to confer arbitration powers on the ACCS in response to Recommendation 2 of the 2019 Ombudsman report.

- 10.8. What is lacking is a process of regular, independent, expert scheme-wide reviews of the Victorian workers' compensation system. As long ago as 1984, the Cooney Inquiry concluded that 'it is clear that review of this complex system should be regular rather than a matter for sporadic enquiry'.² Despite this, the approach to reviewing the operation of the scheme has been sporadic and reactive. This is quite unsatisfactory for such an important social insurance scheme.
- 10.9. I note that there is a requirement for a review every five years of 'any matter relating to the setting of premiums' under Part 10 of the WIRC Act.³ Recent changes to the occupational health and safety regulations have seen the establishment of a 'Workplace Incidents Consultative Committee'. The operation of the Committee is to be reviewed within two years of the appointment of the initial committee members at the instigation of the Minister.⁴ There is no clear rationale for this piecemeal approach.
- 10.10. The Victorian approach contrasts with both good practice and the position under cognate interstate schemes.
- 10.11. For example, the Minister responsible for the Queensland workers' compensation scheme is required to ensure a review is completed at least once every five years on the operation of the scheme.⁵ Major changes to the South Australian scheme in 2014 were the subject of a statutory review in 2017.⁶ The operation of the national work health and safety scheme must be reviewed every five years. The most recent review was published in 2018.⁷ Safe Work Australia's operations must be reviewed periodically.⁸

2 B. C. Cooney, *Report of the Committee of Enquiry into the Victorian Workers' Compensation System* (Report, 1984) 1 ('Cooney Report') 3.

3 *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s490(1) ('WIRC Act').

4 *Occupational Health and Safety Regulations 2017* (Vic) reg 553O as inserted by *Occupational Health and Safety Amendment (Workplace Incidents Consultative Committee) Regulations 2020* (Vic) reg 3.

5 *Workers' Compensation and Rehabilitation Act 2003* (Qld) s 584A.

6 The review was carried out by the Hon John Mansfield AM QC, *Independent Review of the Return to Work Act 2014* (Report, June 2018).

7 Marie Boland, *Review of the Model Work Health and Safety Laws, Final Report* (Report, December 2018).

8 *Safe Work Australia Act 2008* (Cth) s 72.

- 10.12. A requirement for periodic reviews to ascertain how a scheme as complex and large as a state workers' compensation scheme is operating represents good legislative and administrative practice.
- 10.13. The most recent review of the Queensland scheme was completed in May 2018.⁹ It found that while the scheme was generally operating well, it could be improved. The review made 57 recommendations on subjects ranging from broadening the definition of 'worker' to increasing the range of mental injuries that are compensable under the scheme.¹⁰ It also recommended that the next 5-yearly review should encompass both occupational health and safety and workers' compensation in Queensland to ensure the two systems are complementing each other appropriately.¹¹
- 10.14. As discussed in Chapter 5, the Victorian scheme has been subject to a large number of external reviews initiated in response to serious concerns about the operation of the scheme. Some have been instigated by WorkSafe; others have been conducted or triggered by the Ombudsman or the Auditor-General. It should not take a crisis to trigger a review. Periodic reviews can identify emerging problems and risks before they become serious problems.

Recommendation 9: Regular statutory reviews of the scheme

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to mandate a review on the operation of the scheme to be completed by 1 July 2024 and thereafter at least once every five years. The Minister should table each report in Parliament and a copy should be published on WorkSafe's website.

Improving the advice provided to the Minister and WorkSafe

- 10.15. A further way of ensuring that the scheme remains up to date and is responding to the lived experience of injured workers and others is by ensuring that the Minister and WorkSafe are regularly provided with good advice about the scheme's operation.

⁹ David Peetz, *The Operation of the Queensland Workers' Compensation Scheme: Report of the Second Five-Yearly Review of the Scheme* (Report, 27 May 2018).

¹⁰ See, eg, Peetz (n 9) recs 3.1-3.3, 5.1-5.6.

¹¹ Peetz (n 9) xxvii.

- 10.16. Under the scheme at present, there is no advisory committee or process for the Minister to be advised about the operation of the scheme. The Minister is largely reliant on WorkSafe itself as a source of information about the operation of the scheme. As can be seen from WorkSafe's response to the 2016 Ombudsman review and its initial response to the 2019 review, WorkSafe is not necessarily the best self-critic.¹²
- 10.17. WorkSafe's principal source of advice from stakeholders comes via the WorkCover Advisory Committee.¹³ The WorkCover Advisory Committee operates under the WIRC Act and its members are appointed by the Minister. It is made up of:
- persons with a sound knowledge of the law relating to accident compensation;
 - persons with experience in the provision of hospital services or medical services;
 - persons with experience in accident compensation who are nominated by Victorian employer and employee groups; and
 - persons with knowledge and experience in occupational rehabilitation.¹⁴
- 10.18. There is no requirement that the WorkCover Advisory Committee has any members with lived experience of the scheme as injured workers.
- 10.19. Despite the many changes to the scheme since the WorkCover Advisory Committee was established in 1992, its compensation-related advisory functions have not changed.¹⁵
- 10.20. As discussed in Chapter 2, in 1992 the Victorian WorkCover Authority ('VWA') was established, replacing the previous Accident Compensation Commission. The abolished Accident Compensation Commission's Board of Management included members specifically representing the various interests of employers, employees, and government. In contrast, the newly established VWA was intended to have a technocratic, managerial Board as it largely continues to have to this day.¹⁶ The

¹² See the discussion in Chapter 5 above from 5.48.

¹³ *Accident Compensation Act 1985* (Vic) s 31A as inserted by the *Accident Compensation (WorkCover) Act 1992* (Vic) s 9 ('AC Act'). The AC Act has continued in operation since 1 July 2014 by the WIRC Act s 512(1).

¹⁴ WIRC Act s 512(4).

¹⁵ The Committee previously had functions in relation to occupational health and safety (*Accident Compensation Act 1985* (Vic) s 31A(1)(a)). These functions have been conferred on the Occupational Health and Safety Advisory Committee by the *Occupational Health and Safety Act 2004* (Vic) s 19(4).

¹⁶ See *Accident Compensation Act 1985* (Vic) s 23(4) (pre-1992). Cf *Accident Compensation Act 1985* (Vic) ss 26(1), 503 (post 1992). The members of the Board at the date of this Review are listed on the WorkSafe website.

government of the day presumably considered that the WorkCover Advisory Committee could adequately provide for input from employers, employees and subject matter experts, in the absence of their direct involvement on the Board.

10.21. Section 31A was inserted into the *Accident Compensation Act 1985* in 1992 when the previous Accident Compensation Commission was abolished and replaced by the VWA.

10.22. The functions of the WorkCover Advisory Committee are:

- 'to examine, review and make recommendations to the WorkSafe Board in relation to:
- workers' entitlement to compensation, the compensation payable to injured workers, the making of claims for compensation by injured workers and the conciliation of any disputes arising from such claims; and
- the establishment, administration and operation of occupational rehabilitation, vocational re-education facilities and programs available to injured workers; and
- to make recommendations to the Board with respect to—
- the operation and administration of this Act ...; and
- ...
- any other matters referred to it by the Board'.¹⁷

10.23. Searches of 'WorkCover Advisory Committee', 'WorkSafe Advisory Committee' and 'Advisory Committee' on the WorkSafe website on 4 April 2021 revealed no results. I note that WorkSafe's most recent annual report records the members of the Committee, reveals their attendance records and lists some of the 'matters considered by the committee in achieving its purpose'.¹⁸

10.24. Without examining the records of matters referred to the WorkCover Advisory Committee by the WorkSafe Board and records of the Committee's deliberations and recommendations to the Board, it is difficult to comment on the effectiveness of this committee. However, it is concerning that it took two reports by the Ombudsman to reveal serious deficiencies with the way complex workers' compensation claims were being handled by WorkSafe's agents and the poor oversight of those agents by WorkSafe itself.

10.25. Would a properly functioning, transparently operating advisory committee have revealed those deficiencies to WorkSafe before two external investigations did?

¹⁷ WIRC Act s 512(3).

¹⁸ WorkSafe Victoria, *Annual Report 2019-20* (Report, 2020) 155-7 ('WorkSafe Annual Report 2020').

Could a reference from WorkSafe to the committee (under section 512(3)(c) of the WIRC Act) to review the 2016 Ombudsman report and advise the WorkSafe Board on the appropriate response have obviated the need for the Ombudsman to re-visit WorkSafe's handling of complex claims in 2019? We will never know the answers to these important questions but they invite consideration of whether WorkSafe's 30-year-old advisory committee structure remains fit for purpose. In particular, is that structure appropriate to assist WorkSafe to implement the recommendations of this Review and transition to its new role as a claims manager, rather than a contract manager?

- 10.26. The operations of the WorkCover Advisory Committee may be contrasted with arrangements in both New Zealand's accident compensation scheme and in Victoria under the *Occupational Health and Safety Act 2004* (Vic). I will examine each in turn.

Customer advisory panels—Accident Compensation Corporation (New Zealand)

- 10.27. New Zealand's Accident Compensation Corporation's (ACC) customer advisory panels were established in 2018 to provide the ACC with insights about its services and policies. The panels complement the Accident Compensation Corporation's research, analytics, staff feedback and customer co-design.¹⁹
- 10.28. There are five customer advisory panels:
- The scheme customer advisory panel;
 - The serious injury customer advisory panel;
 - The sexual violence customer advisory panel;
 - The older person's customer advisory panel; and
 - The Māori customer advisory panel.
- 10.29. Each panel meets quarterly and has a membership that reflects its terms of reference. Members are paid by the ACC and their terms of reference and the minutes of their meetings are published on the ACC website.²⁰

19 New Zealand Government, ACC, 'Customer Advisory Panel' (Web Page) <<https://www.acc.co.nz/about-us/customer-advisory-panels/>>.

20 New Zealand Government, ACC, 'Maori Customer Advisory Panel – Terms of Reference – August 2019' (Web Page) <<https://www.acc.co.nz/assets/general/fd86751603/tor-maori-customer-advisory-panel.pdf>>; New Zealand Government, ACC, 'Serious Injury, Sexual Violence, Older Persons Panels' (Web Page) <<https://www.acc.co.nz/about-us/customer-advisory-panels/serious-injury-sexual-violence-older-persons/#-terms-of-reference-tor>>.

Improving the experience of injured workers

10.30. The scheme customer advisory panel assists the ACC to improve the design and operation of the scheme. The panel has seven members with work and research interests including information technology, rehabilitation, nursing workforce development, as well as the CEO of the New Zealand Medical Association, a disability advocate and a lawyer with extensive experience representing ACC clients.²¹

10.31. The scheme advisory panel's terms of reference provide that the Panel:

... will provide input to policy development for the Scheme. In order to do this, it is anticipated that the Panel will have the following four broad roles:

Horizon scanning – provide input on changes in the external environment that the Scheme may need to respond to. This may include identifying trends (for example, demographic, health, social and labour markets) that may impact on the Scheme in the medium-to-long term horizon.

Identifying systemic issues – identifying relevant issues in terms of the Scheme's design that Panel members consider need to be addressed and/or opportunities that could be progressed, and providing input to policy development priorities.

Scheme health check – providing broad-stakeholder input to understand Scheme performance, whether the Scheme is applying best evidence-based design and practice, and is delivering intended outcomes.

Testing specific policy or Scheme changes – providing sector input on specific policy changes or projects that have Scheme-wide effects.²²

10.32. This level of openness and transparency may be contrasted with the somewhat opaque operation of the WorkCover Advisory Committee.

The Workplace Incidents Consultative Committee

10.33. A somewhat different approach to ensuring the voice of the injured worker is heard has recently been implemented in Victoria. The Workplace Incidents Consultative Committee was established as part of recent amendments to the *Occupational Health and Safety Act 2004* (Vic) which introduced the offence of

21 New Zealand Government, ACC, 'Scheme Customer Advisory Panel' (Web Page) <<https://www.acc.co.nz/about-us/customer-advisory-panels/scheme-customer-advisory-panel>>.

22 Ministry of Business, Innovation & Employment (NZ), 'Customer Advisory Panel – Accident Compensation Scheme Terms of Reference – April 2018' (Draft Terms of Reference, 2018) 2 <<https://www.acc.co.nz/assets/general/e665cee52d/voc-cap-scheme-advisory-tor.pdf>>.

workplace manslaughter.²³ According to the Minister for Local Government's Second Reading speech, the Workplace Incidents Consultative Committee (WIC Committee) was established to 'provide a necessary public voice to injured workers and the families of victims of workplace fatalities and serious incidents'..²⁴ The Minister explained that the primary function of the Committee will be to:

Provide advice about the information and support needs of persons who are affected by workplace incidents that involve death or serious injury or illness, *and make recommendations for improvements to Victoria's workers compensation scheme*. The Committee will provide a unique perspective on how the scheme can best support injured workers and families..²⁵

- 10.34. In the explanatory memorandum accompanying the Bill, the Minister explained that the 'needs' of injured workers and families that are the Committee's focus 'may include the discussion of needs provided for in legislation other than the OHS Act, such as the Workplace Injury and Rehabilitation [and] Compensation Act 2013'..²⁶
- 10.35. Importantly, the WIC Committee's membership is made up predominately of 'affected persons', being people who have been 'affected directly or indirectly by a workplace incident that involves death, or a serious injury or illness'..²⁷ This represents a significant break from past practice when interest group and 'expert' representation was the primary focus of the WorkSafe advisory bodies.
- 10.36. Committee members who are 'affected persons' are entitled to be paid 'the remuneration and allowances' stipulated in their instruments of appointment..²⁸ In seeking expressions of interest for positions on the WIC Committee, the government has indicated that 'representatives will be paid for their time'. It also indicated that the WIC Committee 'will receive \$4 million in funding over four

²³ *Occupational Health and Safety Act 2004* (Vic) s 126A.

²⁴ Victoria, *Parliamentary Debates*, Legislative Council, 14 November 2019, 4148 (Adem Somyurek, Minister for Local Government).

²⁵ Victoria, *Parliamentary Debates*, Legislative Council, 14 November 2019, 4148 (emphasis added).

²⁶ Explanatory Memorandum, *Workplace Safety Legislation Amendment (Workplace Manslaughter and Other Matters) Bill 2019* (Vic) 9.

²⁷ *Occupational Health and Safety Act 2004* (Vic) s 126A(5). See also *Occupational Health and Safety Regulations 2017* (Vic) reg 553C(1)(a) as inserted by *Occupational Health and Safety Amendment (Workplace Incidents Consultative Committee) Regulations 2020* (Vic), with effect from 29 September 2020.

²⁸ *Occupational Health and Safety Regulations 2017* (Vic) reg 553E(1)(b).

Improving the experience of injured workers

years...to put its recommendations in practice and improve Victorian occupational health and safety'.²⁹

- 10.37. The WIC Committee is jointly chaired by a 'government co-chairperson' and a 'non-government chairperson'.³⁰ The non-government co-chairperson is empowered to invite a range of people, including the Director of Public Prosecutions, the State Coroner and the Chief Executive of WorkSafe, to Committee meetings to provide 'expert or technical advice' to 'assist it to perform its function'.³¹
- 10.38. The WIC Committee 'may' give the Minister a written report of its operations during a particular financial year and, if such a report is received by the Minister, it must be tabled in Parliament.³² Finally, the Minister must ensure that a review of the first year of the operation of the regulations under which the WIC Committee is established is undertaken 'within two years of the appointment of the initial committee members'.³³
- 10.39. The Committee will operate alongside the existing Occupational Health and Safety Advisory Committee. That Committee is an expert and stakeholder representative body established under the *Occupational Health and Safety Act 2004* (Vic) along the lines of the WorkCover Advisory Committee.³⁴

Enhancing worker involvement

- 10.40. In conducting this Review, I have heard many injured workers explain that they do not feel heard and that they do not have a 'voice' in the Victorian workers' compensation system. The Review has heard frequent calls for the voice of injured workers to be brought to the 'centre' of the system.
- 10.41. Uniting Victoria submitted:

The ombudsman reports gave a voice to the injured. It is a voice that has been heard in some forums. But rarely has that voice been heeded to the extent that

29 Department of Justice and Community Safety, 'Expressions of Interest open for the inaugural Workplace Incidents Consultative Committee' (Web Page, 4 November 2020) <<https://www.justice.vic.gov.au/expressions-of-interest-open-for-the-inaugural-workplace-incidents-consultative-committee>>.

30 *Occupational Health and Safety Regulations 2017* (Vic) regs 553C(1)(b), 553C(2)(a).

31 *Occupational Health and Safety Regulations 2017* (Vic) reg 553G.

32 *Occupational Health and Safety Act 2004* (Vic) s 126B.

33 *Occupational Health and Safety Regulations 2017* (Vic) reg 553O.

34 *Occupational Health and Safety Act 2004* (Vic) s 19. See generally William Breen Creighton and Peter Rozen, *Occupational Health and Safety Law in Victoria* (Federation Press, 4th ed, 2017) 69, 81-84.

Improving the experience of injured workers

fundamental respect was given and the need for change embraced by those with the capacity and responsibility to make that change.³⁵

10.42. In October 2020 I held an online discussion with injured workers from an injured workers' support group, the Injured Workers Peer Support Network. I heard that the 'current model only works if you have an independent party advocating for the worker and holding agents to account'.³⁶

10.43. In speaking with injured workers, I was also told that it was in response to their own experience in the system that they were motivated to speak out for broader change. Injured workers told me that they were speaking out about what had happened to them because they were concerned about those unable to speak for themselves. 'Rachel's' husband was injured at work. Rachel told the Review:

I worry for people that English is not their first language. We get by because if I find that there's something wrong, I keep going back to them to follow up, but there are people out there who don't understand, particularly if you can't speak or read English well.³⁷

10.44. Rosemary McKenzie-Ferguson is the founder of an organisation called Craig's Table. Initially operating only in South Australia, and now also operating in New South Wales, Craig's Table is run by injured workers to provide support and connection for injured workers and their families, along with training, which is designed to improve the ability of injured workers to transition back to work.³⁸

10.45. Ms McKenzie-Ferguson started Craig's Table because she saw a gap between what injured workers needed and what the system was offering: 'Injured workers want respect, to be part of their own claim. They feel left out of their own claim.'³⁹ Ms McKenzie-Ferguson considers that 'WorkSafe Victoria needs to engage with the injured worker community in ways it has not contemplated or considered impossible till now.'⁴⁰

10.46. There is clearly a need to give injured workers a voice within the scheme, both in respect of their own claims and with respect to the broader operation of the system.

35 Submission DP51 (Uniting Victoria) 14.

36 Consultation 20 (Injured workers forum convened with the Injured Workers Peer Support Network (IWPSN)) 8.

37 Consultation 40 (Individual worker telephone call 13).

38 Consultation 17 (Expert session 1).

39 Consultation 17 (Expert session 1).

40 Submission OP6 (Craig's Table) i.

'Heartbeat'

- 10.47. In addition to the Customer Advisory Panels discussed above, New Zealand's ACC receives client feedback through a process called 'Heartbeat'. This is a mechanism which uses a 'short loop' and 'long loop' approach to receiving customer feedback. The features of 'Heartbeat' (and the 'short loop' and 'long loop' design) are described in Chapter 7 of this report.⁴¹
- 10.48. Based on my observations of the ACC's 'Heartbeat' and the shortcomings of the Victorian system, I recommend that WorkSafe take a similar approach to the ACC to receiving and responding to feedback. This would enable an immediate response to issues with individual claims and also a longer term approach to systemic change. This approach should form part of the redesigned Victorian workers' compensation scheme described in Chapter 9.

Responding to feedback

- 10.49. The Ombudsman was highly critical of WorkSafe's complaint and feedback mechanism in her 2016 report, finding that WorkSafe:

only tracks the number and nature of the complaints it receives. It does not track the number of complaints that result in WorkSafe raising concerns with the agent about its decision nor their outcomes, [or] the number of agent decisions changed as a result of a complaint.⁴²

- 10.50. The Ombudsman recommended that WorkSafe:

Implement a system to record, collate and track complaints, feedback, discussions with agents and outcomes, and use this data to:

- a. identify and remedy complaint patterns and systemic issues
- b. assist identifying trends in agent decision-making practices and potential systemic issues in the scheme
- c. conduct ongoing audits of samples of claims disputed at conciliation, Medical Panels and court where the decision was changed.⁴³

41 See discussion in Chapter 7 at 7.136.

42 Victorian Ombudsman, *Investigation into the management of complex workers compensation claims and WorkSafe oversight* (Report, 12 September 2016) 142 ('Victorian Ombudsman 2016').

43 Victorian Ombudsman 2016 (n 42) 162, Recommendation 4.

Improving the experience of injured workers

10.51. In her 2019 investigation, the Ombudsman reviewed the adequacy of WorkSafe's progress in respect of complaints since her 2016 report. Ultimately, the Ombudsman remained dissatisfied with WorkSafe's approach to complaints and considered that more needed to be done. The Ombudsman found that it was only the courts, 'in the very small portion of cases that end up at court', that hold the agents 'accountable for making sustainable decisions'. The Ombudsman found that:

Complaints and stakeholder feedback provide WorkSafe opportunities to check agents' performance; however, its role in complaints about agent decisions is ill-defined and unclear...

This has led to inconsistent approaches in the way WorkSafe handles complaints and missed opportunities for WorkSafe to rectify poor decisions.

The injured worker survey also provides WorkSafe valuable feedback about agent performance, *but it does not concentrate on workers with complex claims*. Given the risks and complexities of these claims, there is scope for WorkSafe to increase its focus on complex claims through the survey and other oversight mechanisms.⁴⁴

10.52. In her 2019 report, the Ombudsman made two recommendations to WorkSafe directed to complaints procedures:

Recommendation 4: Establish a centralised complaints process which triages and provides a single point of contact for all complaints about the claims process, including agent decisions and IMEs.⁴⁵

Recommendation 8: Amend the Injured Worker Survey measure so that it better targets complex claims, which may include:

- increasing the focus on complex claims in the current survey; or
- introducing a separate survey of workers with complex claims.⁴⁶

10.53. As noted above, the Ombudsman was concerned that the WorkSafe Injured Worker Survey does not adequately reflect the experience of workers with complex claims. In its 2020 annual report, WorkSafe reported that it was in the process of amending the Injured Worker Survey so that it better targets workers with complex claims.⁴⁷ The report also stated that WorkSafe had introduced a

44 Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019) 221 ('Victorian Ombudsman 2019') (emphasis added).

45 Victorian Ombudsman 2019 (n 44) 225, Recommendation 5.

46 Victorian Ombudsman 2019 (n 44) 226, Recommendation 8.

47 WorkSafe Annual Report 2020 (n 18) 173.

Improving the experience of injured workers

new centralised complaints management service 'which is responsible for end-to-end management and resolution of all workers compensation complaints'.⁴⁸ The annual report stated that at 30 June 2020, the average complaints resolution time was 10 days, down from 27 days in June 2019.⁴⁹

10.54. The Ministerial Oversight Committee is a temporary committee made up of union, employer and other stakeholder representatives. It was established in October 2019 to oversee the implementation of the recommendations from the Ombudsman reports. WorkSafe provided the Ministerial Oversight Committee with a report on work it had undertaken to respond to the Ombudsman's recommendations.⁵⁰ WorkSafe reported to the Ministerial Oversight Committee that it had a marked reduction in complaints about agent decisions in 2020, with an average of 13 complaints per month about agent decision making out of a total average of 103 workers' compensation complaints overall.⁵¹

10.55. Notwithstanding WorkSafe's efforts to respond to the Ombudsman's recommendations and improve the injured worker survey, it is plain from the evidence I have heard that the current limitations of the injured worker survey render it inadequate.

10.56. In its submission, Gallagher Bassett considered that the injured worker survey could be further improved to ensure that:

the individual needs of the injured worker are being captured. Particular questions for particular claim groups or real time feedback would allow any issues or concerns to be addressed swiftly. Currently unless an injured worker informs us of their dissatisfaction either through a complaint, during a phone call or other means of communication we are unaware.⁵²

10.57. Another agent also queried the utility of the injured worker survey:

The Injured Worker Survey (IWS) was developed in its current format to give agents an opportunity to improve the experience the worker has throughout the claims process. The current format of the survey impedes an agent's ability to understand the service experience, given the surveys are lagged (up to nine months) and are anonymous. Therefore, it is very difficult to ascertain what the agent may have done better or how to recover the relationship. The current IWS targets six key events and attempts to ensure communication around these key claim events is effective and

48 WorkSafe Annual Report 2020 (n 18) 19.

49 WorkSafe Annual Report 2020 (n 18) 172.

50 WorkSafe Victoria, *Monitoring and Oversight Committee Report* (Report, August 2020) ('WorkSafe MOC Report').

51 WorkSafe MOC Report (n 50) 33.

52 Submission DP27 (Gallagher Bassett) 27.

Improving the experience of injured workers

*focused on ensuring the workers understand their entitlements and obligations. It is unclear whether this approach provides any assistance to injured workers with complex claims and their service experience.*⁵³

10.58. The same agent told the Review that it has introduced a 'Voice of Customer' survey:

that is designed to seek injured workers' opinions in real time, utilise their feedback to improve our service and also as a method of 'relationship recovery' with an injured worker. This could also be expanded to include complaints resolution and service recovery. [The agent] believes the Injured Worker Survey could be improved through real time surveying. The use of email surveys is more responsive and allows agent access to the respondent's feedback in real time and can make a significant difference in both measuring and improving the injured worker's experience. It is also clear that what is lacking is an immediate ability for workers and other key participants to provide immediate complaint or positive feedback of their experience in the scheme.⁵⁴

10.59. Union groups also expressed concerns about the current approach to worker surveys as a way of assessing the performance of the scheme and agents. The Australian Nursing and Midwifery Federation and the Police Association of Victoria referred to the limited number of workers the current survey captures.⁵⁵ The Australian Meat Industry Employees Union highlighted that 'purely quantitative data collection rarely provides the true picture when it comes to assessments of satisfaction' and observed that

as injured workers find themselves in an adversarial system many will opt out of being surveyed. As an injured worker who had been in the workers compensation system for some years has expressed to the union "why would I speak to anybody, anything that I say will be twisted and used against me". In the meat industry workers are culturally and linguistically diverse, many have limited English skills and need interpreters to communicate, they will not feel confident enough to participate in surveys.⁵⁶

10.60. The Australian Services Union also raised concerns about the current approach of collecting complaints data and surveys as a measure of whether the needs of workers are being met. It submitted that 'the focus of measuring outcomes

53 Submission DP55 (WorkSafe agent – name withheld) 15 (emphasis added).

54 Submission DP55 (WorkSafe agent – name withheld) 16.

55 Submissions DP4(ANMF) 29, DP48 (TPAV) 9.

56 Submission DP7 (AMIEU) 14-15.

should be on the wellbeing of the worker and the impact of agent decision making on their health' and that long-term data should be kept.⁵⁷

10.61. Slater and Gordon Lawyers raised similar concerns. It considered that the scheme would benefit from hearing from a broader range of participants, for example treating doctors. Slater and Gordon Lawyers also submitted that the outcomes of the worker surveys should be made publicly available.⁵⁸

10.62. It is encouraging to see that WorkSafe has taken active steps to respond to the Ombudsman's recommendations in both 2016 and 2019. While noting data from 2020 is limited because of the impact of the pandemic, it is positive to see the reduction in complaints that WorkSafe has reported.⁵⁹ However, there is clearly more work to be done. For example, it is not apparent:

- whether WorkSafe has any evaluation strategy in place to respond to complaints received;
- what is done with the data recorded;
- who receives complaints data once it is recorded by WorkSafe;
- how themes or patterns are identified to enable systemic change; and
- what, if anything, is done in response to themes or patterns of complaint.

10.63. WorkSafe's current approach to complaints also lacks the ability for an injured worker to provide 'real time' feedback to WorkSafe.

10.64. WorkSafe needs to improve its feedback mechanisms, to enable it to provide immediate responses to injured workers and systemic change. Injured workers should not have to wait for an Ombudsman's report for their voice to be heard.

10.65. WorkSafe should be open to all feedback, both good and bad, and that feedback should be used to inform scheme improvements.

10.66. I address the form that a feedback mechanism should take to enable both immediate responses and systemic change in Recommendation 10 below, as well as what guidance the ACC's experience provides.

⁵⁷ Submission DP 16 (ASU) 5.

⁵⁸ Submission DP45 (Slater and Gordon Lawyers) 16-17.

⁵⁹ See, WorkSafe MOC Report (n 50) 56.

Recommendation 10: Improved feedback procedure

WorkSafe should introduce a mechanism which enables the following parties to provide feedback about WorkSafe and its agents:

- a) Workers, their family members and/or representatives
- b) Employers
- c) Providers of services, including, but not limited to, medical practitioners, allied health professionals, rehabilitation services.

The feedback mechanism should allow frontline staff of WorkSafe and its agents to receive and act on real time feedback obtained through a) – c).

The feedback should be used to identify and respond to systemic issues within the scheme. This systemic information should be shared with:

- a) The WorkSafe Reform Implementation Monitor; and
- b) The expanded Workplace Incidents Consultative Committee

The development of this feedback mechanism should be informed by the best practice approach of 'Heartbeat' used by the Accident Compensation Corporation in New Zealand, in combination with existing approaches used by WorkSafe to conduct 'health checks' on claims.

This should occur by 1 January 2023.

10.67. Even with the introduction of a 'Heartbeat' approach in Victoria, the apparent failure to address the needs of injured workers, which led to two Ombudsman inquiries and this Review, suggests a need for another avenue for the voices of injured workers and their families.

10.68. Injured workers and their families have turned their minds to how their 'voice' could be incorporated to drive improvement and systemic change to the Victorian workers' compensation scheme. An injured worker proposed that a possible solution might be for an injured workers' representative to be on the WorkCover Advisory Committee.⁶⁰ The support person for an injured worker suggested an advisory committee of workers / family members to 'advise on implementable change'.⁶¹

60 Survey response (worker) 265726.

61 Survey response (support person) 263497.

Improving the experience of injured workers

- 10.69. As noted above, there is no provision for an injured worker representative on the WorkCover Advisory Committee; the interests of injured workers are represented by unions.
- 10.70. The inclusion of a dedicated injured worker on the WorkCover Advisory Committee is worthy of consideration. However, I am unconvinced that a single, dedicated injured workers' representative on an existing committee is an effective way to give all injured workers a voice.
- 10.71. As noted above, I am concerned about the lack of transparency and effectiveness of the WorkCover Advisory Committee.
- 10.72. I am also concerned about the proliferation of advisory bodies. There are already three committees. Only one of these—the WIC Committee—has a structure that ensures that the voices of injured workers are heard. It also shares a number of the positive features of the New Zealand Customer Advisory Panels such as the payment of members.
- 10.73. In the short term, the remit of the WIC Committee should be expanded. The WIC Committee should provide advice to the Minister on how to improve outcomes for injured workers.
- 10.74. In the longer term, the operation of the various Committees should be reviewed and rationalised. The division of responsibility between the Occupational Health and Safety Advisory Committee under the OHS Act and the WorkCover Advisory Committee under the WIRC Act unnecessarily emphasises the distinction between the prevention and compensation functions of WorkSafe.⁶²

A code of injured workers' rights

- 10.75. In Chapter 4, I discussed the agents' code of conduct in the agency agreement.⁶³ I noted that the scope of the document is very limited. It focuses on reputational and financial risk to WorkSafe and it confers no rights on injured workers. In contrast, the ACC's (New Zealand) 'Code of Accident Compensation Corporation Claimants' Rights' focuses on the rights of claimants.
- 10.76. The *Accident Compensation Act 2001* (NZ) provides that a purpose of the Act is 'ensuring positive claimant interactions with the Corporation through the development and operation of a Code of Accident Compensation Corporation

⁶² See discussion in Chapter 9 at 9.19.

⁶³ See discussion in Chapter 4 at 4.63–4.64.

Claimants' Rights'.⁶⁴ This is a powerful statement, enshrined in legislation, about the primacy of the injured person. It protects the rights of the people for whom the scheme exists.

10.77. The purpose of this Code is to 'meet the reasonable expectations of claimants (including the highest practicable standard of service and fairness) about how the Accident Compensation Corporation should deal with them'.⁶⁵

10.78. The *Code of Accident Compensation Corporation Claimants' Rights* ('the Code'), was published in 2002. The 'Spirit of the Code' is described as follows:

This Code encourages positive relationships between ACC and claimants. For ACC to assist claimants, a partnership based on mutual trust, respect, understanding, and participation is critical. Claimants and ACC need to work together, especially in the rehabilitation process. This Code is about how ACC will work with claimants to make sure they receive the highest possible standard of service and fairness.⁶⁶

10.79. The Code lists eight rights of claimants, with corresponding obligations imposed on the ACC. The rights are:

- the right to be treated with dignity and respect;
- the right to be treated fairly, and to have your views considered;
- the right to have your culture, values and beliefs respected;
- the right to a support person or persons;
- the right to effective communication;
- the right to be fully informed;
- the right to be informed of appeal and review rights under the Act; and
- the right to complain.⁶⁷

10.80. The Code also sets out a procedure for lodging and dealing with complaints and remedies if the ACC's 'complaints service' finds there has been a breach of the Code. These include an apology, a meeting and a written explanation.⁶⁸

⁶⁴ *Accident Compensation Act 2001* (NZ) s 3(e).

⁶⁵ *Accident Compensation Act 2001* (NZ) s 40(1).

⁶⁶ *Injury Prevention, Rehabilitation, and Compensation (Code of ACC Claimants' Schedule Rights) Notice 2002* (NZ) SR 2002/390 3 ('Code of ACC Claimants' Rights').

⁶⁷ Code of ACC Claimants' Rights (n66) pt 2.

⁶⁸ Code of ACC Claimants' Rights (n66).

10.81. The Code requires the ACC to ‘address the wider implications’ of breaches of the Code by reviewing operational processes and policies where complaints data reveals systemic problems.⁶⁹

Recommendation 11: Expand the remit of the Workplace Incidents Consultative Committee

The government should expand the remit of the Workplace Incidents Consultative Committee. The expanded remit should include providing advice and making recommendations to the Minister about the development, review and improvement of policies, practices, strategies and systems relating to workers’ compensation and the rehabilitation of injured workers. This could be achieved by amending section 126A(2) of the *Occupational Health and Safety Act 2004* (Vic).

Recommendation 12: Greater transparency by WorkSafe

WorkSafe should amend its website to include up-to-date information about the membership and the minutes of meetings (redacted if necessary to preserve privacy or for other legitimate reasons) of:

- the WorkCover Advisory Committee;
- the Occupational Health and Safety Advisory Committee; and
- the Workplace Incidents Consultative Committee.

Recommendation 13: Future role of WorkSafe’s advisory committees

The scope of the review of the Workplace Incidents Consultative Committee under regulation 553O of the *Occupational Health and Safety Regulations 2017* (Vic) should be expanded to consider the operation and potential rationalisation

⁶⁹ Code of ACC Claimants’ Rights (n66).

of the Workplace Incidents Consultative Committee, the WorkCover Advisory Committee and the Occupational Health and Safety Advisory Committee.

To ensure that the amended regulation is within power, it should be made under the regulation-making power in the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) as well as the regulation-making power in the *Occupational Health and Safety Act 2004* (Vic).

Recommendation 14: A Code of Injured Workers' Rights

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to require WorkSafe to develop and publish on its website a Code of Injured Workers' Rights. This should be prepared in consultation with the WorkCover Advisory Committee, the Workplace Incidents Consultative Committee and any other people nominated by the Minister for Workplace Safety.

The Code should identify the rights of workers and the corresponding responsibilities of WorkSafe, as well as the process by which rights may be enforced.

In developing the Code, WorkSafe should consider other examples including the New Zealand 'Code of ACC Claimants' Rights'.

Self-insurance

- 10.82. As discussed in Chapter 3, the WIRC Act provides for certain employers to apply to WorkSafe for approval as a self-insurer. WorkSafe may only grant such approval if it is satisfied that the employer is 'fit and proper to be a self-insurer' having regard to matters including its business resources and its occupational health and safety record.⁷⁰
- 10.83. A self-insured employer is responsible for meeting its own liabilities under the Act.⁷¹ An employer approved to self-insure must comply with the terms and conditions of any Ministerial Order made under section 380(3) of the WIRC Act.⁷²

⁷⁰ WIRC Act s 379(4).

⁷¹ An employer approved to self-insure must comply with the terms and conditions of any Ministerial Order made under s the WIRC Act s 380(3).

⁷² See WIRC Act s 380(1)(a).

10.84. The Self-insurer Terms and Conditions of Approval Order 2016 relevantly provides:

A. A self-insurer ..., must

document its claims management policies, provide these policies to the Authority and make the policies readily available to its workers;

...; and

B. A self-insurer may elect to adopt the WorkSafe Claims Manual in place of developing and maintaining their own claims management policies. If a self-insurer adopts the WorkSafe Claims Manual, the self-insurer must notify the Authority and make the WorkSafe Claims Manual readily available to its workers.

C. If a self-insurer does not elect to adopt the WorkSafe Claims Manual then any policy documented by the self-insurer which differs from the Authority's Claims Manual is to be provided to the Authority prior to implementation by the self-insurer.⁷³

10.85. An employer approved as a self-insurer may appoint a person approved by WorkSafe to manage its claims.⁷⁴ I understand that several self-insurers have done this. However, self-insurers stand outside some of the accountability mechanisms under the scheme. For example, workers employed by self-insurers have no access to the newly created Workers Compensation Internal Review Service.⁷⁵

10.86. Several submissions described poor handling of complex claims by self-insurers. For example, the Victorian Trades Hall Council submitted that:

Self-insurers use their position as both the employer and the insurer to leverage outcomes that favour the employer and disadvantage the injured worker.

For example, at conciliation, self-insurers often make offers contingent upon the injured worker resigning from their employment, effectively absolving the employer of their obligation to find suitable, alternative employment up to and beyond the 52

⁷³ Victoria, *Victorian Government Gazette*, No. G 16, 14 April 2016, 799-800.

⁷⁴ WIRC Act s 392.

⁷⁵ The Claims Manual at 7.5.3 provides that 'any decision made by, or on behalf of, a self-insurer under the workers' compensation legislation' is not a reviewable decision. WorkSafe Victoria, 'Claims Manual' (Web Page, 2020) pt 7.5.3

<[www1.worksafe.vic.gov.au/vwa/claimsmanual//7-dispute-](http://www1.worksafe.vic.gov.au/vwa/claimsmanual//7-dispute-resolution/7.5_Independent_review/7.5_workers_comp_independent_review.htm)

[resolution/7.5_Independent_review/7.5_workers_comp_independent_review.htm](http://www1.worksafe.vic.gov.au/vwa/claimsmanual//7-dispute-resolution/7.5_Independent_review/7.5_workers_comp_independent_review.htm)>. The role of the Workers Compensation Internal Review Service is discussed in Chapter 3 from 3.99.

Improving the experience of injured workers

week mark. Comparatively, it is rare for authorised agents to conflate the issue of ongoing employment with resolving the claim.⁷⁶

- 10.87. The Law Institute of Victoria submitted that ‘...poor conduct and mishandling of claims frequently involves self-insurers whose behaviour often goes unchecked and appears removed from accountability structures within WorkSafe’.⁷⁷
- 10.88. The issue of self-insurers is not expressly mentioned in the Terms of Reference. Other than the above submissions, I have received little evidence about self-insurers. I do not know how many self-insurers have elected to manage their claims using the claims manual. Nor do I know how many have appointed agents under the WIRC Act.⁷⁸
- 10.89. However, I am concerned that the reforms to complex claims management that will result from the implementation of the recommendations in Chapter 9 will not benefit workers employed by self-insurers. There is no reason why a worker with, for example, a claim for a mental injury, who works for a self-insurer should have their claim managed in a way that is inferior to a worker with the same claim who happens to work for an employer that is insured with WorkSafe.
- 10.90. One way of avoiding a bifurcated complex claims system would be to require that self-insurers manage complex claims using the same person-centred approach that WorkSafe will apply in its Complex Claims Unit.
- 10.91. WorkSafe should consider this as part of its implementation of the recommendations of this Review during the years ahead. It is also a matter that the WorkSafe Reform Implementation Monitor should consider as part of their oversight of the implementation of the reforms.
- 10.92. Finally, the first periodic review of the WIRC Act should examine the role of self-insurers if appropriate.

Surveillance of injured workers

- 10.93. One of the criticisms of the agent model made in the Ombudsman’s 2019 report was that agents were using surveillance of injured workers without adequate justification.⁷⁹ This was one of the issues that arose during the 2019 investigation

76 Submission DP54 (VTHC) 29.

77 Submission DP39 (LIV) 9.

78 WIRC Act s 392.

79 Victorian Ombudsman 2019 (n 44) 40-47 (see Recommendations 6(c) and 7(a) at 226).

that had not arisen in the 2016 investigation. The Ombudsman was also concerned with WorkSafe's oversight of the use of surveillance by its agents.

- 10.94. Surveillance was not a matter expressly referred to in the Terms of Reference for this Review but was raised in several submissions.⁸⁰
- 10.95. The case study below describes one injured worker's account to the Review of the negative effects of surveillance.

Case study – 'Jason'

Before suffering from a rare and severe workplace injury to his spinal cord, Jason had been working as a tradesman on major projects for 25 years. Jason told the Review: *'I got injured and treated like a criminal'*. Jason described one of many difficult experiences he had with surveillance during his claim. He was driving with his young children to his daughter's friend's 6th birthday party, which was about 5 kilometres from home.

Jason described that after being tailgated for a period of time, he realised that he was being followed by a private investigator: *'they pushed really hard'*. Jason said the vehicle cut him off, before he turned down a street to get to the birthday party, which seemed to take the investigator by surprise. The investigator parked in front of the house where the party was and remained there. At the party, fellow guests asked Jason who was parked out the front. Jason said *'it was intimidating. I still look over my shoulder every time I leave the house, even now, when the case is over...it's left a mark'*.

- 10.96. Jason's case study above highlights the lasting and unnecessary impact of the use of surveillance on workers in the Victorian workers' compensation system.
- 10.97. Jason's story is not an isolated one. Many workers with whom the Review engaged, along with their support networks and representatives, expressed their frustration about the use of private investigators by agents and the tactics used by private investigators.
- 10.98. Workers expressed their feelings of hurt and indignity at being the subject of surveillance. 'Jade' described the experience of living in a small country town and how awkward it is to be followed by a car when she is walking the dog. Jade said that she sees private investigators following her when she takes her son to school:

*it was so obvious when they are following you, it's ridiculous.*⁸¹

⁸⁰ See, eg. Submissions DP4 (ANMF), DP7 (AMIEU), DP28 (worker, name withheld), DP32 (IEU).

⁸¹ Consultation (individual worker, telephone call 16).

Improving the experience of injured workers

10.99. In response to the Review's survey, another worker questioned private investigators being paid to do surveillance on 'us'. He said that he had accessed the surveillance footage that had been taken of him -

'do you know how degrading it is to see yourself in film being followed?'⁸²

10.100. The surveillance methods of private investigators on a worker involve a significant invasion of the worker's privacy (and often the privacy of those around them). This can pose a risk to the worker's mental health and wellbeing. However, there is no publicly available data that explains the extent to which surveillance by agents has resulted in fraudulent claims being identified.

10.101. The Australian Services Union explained in a submission that, while acknowledging the need for investigating cases of blatant fraud, '[surveillance] film invades the privacy of our members and makes them feel like they are being subject to an investigation for wrongdoing when all they are doing is accessing an entitlement for a workplace injury'.⁸³

10.102. The Victorian Trades Hall Council submitted that:

The agent should have to apply to an independent body that is part of WorkSafe to use surveillance. To be successful in their application, they must be able to meet a high bar and demonstrate a genuine suspicion that some form of fraud is occurring and this can only be verified by surveillance and not some other form of investigation. The independent body should have the power to authorise or deny the use of surveillance, and where it is approved, it should be recorded and regularly reviewed.⁸⁴

10.103. In her 2019 report, the Ombudsman recommended that WorkSafe should:

Update the Claims Manual, and provide training to agent staff, to:

...

c. clarify and expand the requirements about agents' use of surveillance, including what constitutes 'adequate evidence', record keeping standards and the use of surveillance in mental injury claims.⁸⁵

10.104. Recommendation 7(a) of the 2019 report reads:

⁸² Survey reference (worker) 261549.

⁸³ Submission DP16 (ASU) 3; see also Submission DP49 (UFU) 4.

⁸⁴ Submission DP54 (VTHC) 30-31.

⁸⁵ Victorian Ombudsman 2019 (n 44) 226, Recommendation 6c.

Improving the experience of injured workers

Increase WorkSafe's oversight of the following claims management activities by agents through targeted 'health checks' or audits:

Agents' use of surveillance.⁸⁶

10.105. WorkSafe advised me that, since December 2019 it has taken the following steps in response to the Ombudsman's 2019 Recommendations 6c and 7a:

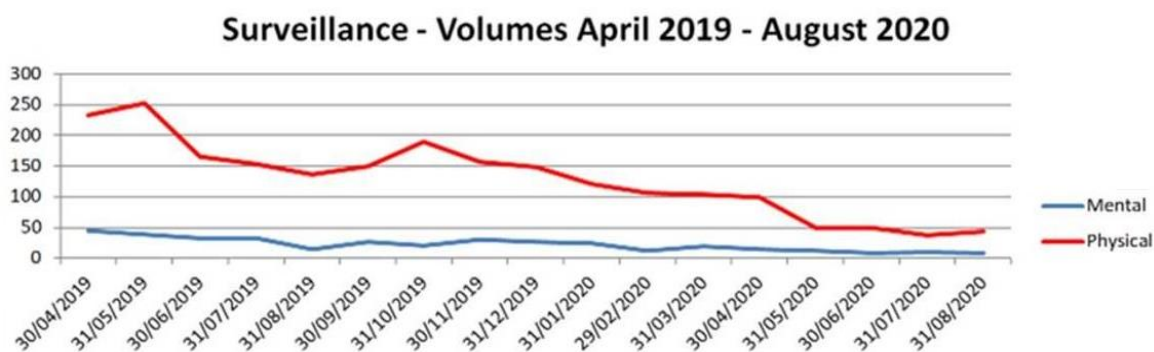
- conducting quarterly health checks for the purpose of greater oversight by WorkSafe of agents using surveillance
- receiving legal advice regarding the use of 'adequate evidence'
- updating the Claims Manual in respect of
 - the expectations of agents on 'adequate evidence' to support decisions for surveillance; and
 - the expectations on the use of surveillance by agents
 - requiring a treating health practitioner or IME to be consulted in respect of the potential use of surveillance
- sending email correspondence to its agents on
 - guidelines around the use of surveillance by agents, including the expectations around the use of surveillance by agents
 - updating guidelines on the use of surveillance by agents, including requiring the authorisation of surveillance by a team manager
- conducting training modules on use of surveillance by agent staff and Independent Medical Examiners.⁸⁷

10.106. Data provided by WorkSafe shows that the use of surveillance by agents decreased significantly between 30 April 2019 and March 2020. This is demonstrated by Figure 11 below. The Ombudsman's 2019 report was tabled in December 2019. I was provided with Figure 11 by WorkSafe as the most recent available data on the use of surveillance by agents.

⁸⁶ Victorian Ombudsman 2019 (n 44) 226.

⁸⁷ WorkSafe Victoria, 'Information Brief: Recommendations 6 and 7' (Brief, 13 November 2020).

Figure 11: Surveillance volumes April 2019 – August 2020



10.107. The use of surveillance by agents was significantly reduced during 2020 because of COVID-19 restrictions. Data from 2020 about the use of surveillance by agents will therefore need to be considered against the background of those changed circumstances.

10.108. Further, although WorkSafe notes that the use of surveillance by agents has significantly reduced in the past twelve months, it has also properly informed me that it is too early to assess the effectiveness of the measures introduced by WorkSafe in response to the Ombudsman's Recommendation 6c.

10.109. I consider that the steps taken by WorkSafe to implement the Ombudsman's recommendations on the use of surveillance are positive. However, the limited evidence before me means it is difficult to assess whether they will result in changed agent behaviour on a sustainable basis.

10.110. More can, and should, be done to clarify the circumstances in which surveillance is authorised.

10.111. It should be as difficult to obtain permission to conduct surveillance on workers as it is for a WorkSafe inspector to obtain a search warrant. The *Occupational Health and Safety Act 2004* (Vic) allows an inspector to apply to a magistrate for a search warrant 'if the inspector believes on reasonable grounds that there is ... a particular thing (including a document) at the place that may afford evidence of the commission of an offence against this Act...' ⁸⁸

10.112. A magistrate can only issue a warrant if satisfied on oath that there are such grounds. ⁸⁹ The reasons for this are self-evident: a search warrant represents a

⁸⁸ OHS Act s 104(1). See also WIRC Act s 558.

⁸⁹ OHS Act s 104(2).

significant invasion of a person's privacy. It is justifiable, but only in tightly controlled circumstances.

- 10.113. I consider that the use of surveillance on workers should require a similar process. An appropriately senior WorkSafe officer should be designated to approve the use of surveillance. An agent that wants to conduct surveillance on a worker should be required to apply to that officer for permission. Any application should be supported by facts that ground a 'reasonable suspicion' of the agent. Permission should only be granted where the designated WorkSafe officer is satisfied that there are reasonable grounds for the proposed surveillance and there is no alternative means of investigation available.
- 10.114. There should be clear consequences for an agent that fails to meet the above requirements.
- 10.115. The use of surveillance should be recorded and clearly described in WorkSafe's annual report. The annual reporting on the use of surveillance by WorkSafe should describe:
- the number of applications made for surveillance;
 - the number of those applications approved or denied; and
 - the number of instances where the use of surveillance was relied on to reject or support claims made.
- 10.116. In Chapter 9 above I have made a number of recommendations which will see direct responsibility transferred from agents to WorkSafe of many of the claims where surveillance may be used. Under such a redesigned system, the high threshold which I find should be met before authorising surveillance on complex claims, will need to be assessed by WorkSafe itself. This requires it to have rigorous internal procedures governing such matters.
- 10.117. This is a matter to which the WorkSafe Reform Implementation Monitor (see Recommendation 22) should pay special attention. It should also be examined as part of the first periodic review of the WIRC Act (see Recommendation 9).

Recommendation 15: WorkSafe to control when surveillance can be used on workers

An agent that wants to conduct surveillance on a worker should be required to apply to WorkSafe for permission. Any such application should be supported by evidence that grounds the agent's 'reasonable suspicion' that the use of surveillance is necessary. Permission should only be granted where WorkSafe is

satisfied that there are reasonable grounds for conducting the proposed surveillance and there is no less invasive method of investigation which would adequately address the agent's concerns. The permission should identify the type of surveillance authorised and the duration for which it is authorised.

In its annual report, WorkSafe should report on:

- the number of applications made for surveillance;
- the number of those applications approved or denied; and
- the number of instances where the use of surveillance was relied on to reject or support claims made.

Independent medical examiners

10.118. The role of Independent Medical Examiners (IMEs) in the WorkSafe scheme is discussed in Chapter 3.⁹⁰ Agents' use of IMEs was the subject of substantial discussion and criticism in the Ombudsman's 2019 report. The Ombudsman noted '[a]gents are still ... relying on IMEs over treating doctors even when evidence is unclear, contradictory or inconclusive – or ignoring it if it didn't support termination'.⁹¹ The Ombudsman made six recommendations to address her concerns about IMEs.⁹²

10.119. In spite of the Ombudsman's recommendations, the Review heard from many injured workers who described their frustration with the IME process, including:

- being sent to an IME who did not appear qualified to assess the specific injury of the worker;
- being required to attend an IME who is located at considerable distance from where the worker lives;
- IME reports being used by agents to suggest that the worker was lying about their injury;
- delays in receiving treatment because of the IME process; and
- difficulty accessing their IME reports.

10.120. The following case study outlines one worker's experience of being sent to an IME.

⁹⁰ See the discussion in Chapter 3 at 3.41.

⁹¹ Victorian Ombudsman 2019 (n 44) 6.

⁹² Victorian Ombudsman 2019 (n 44) 227 (Recommendations 10–15).

Case study on IMEs – ‘Harry’

Harry is a client of law firm Slater and Gordon Lawyers. In their submission in response to the discussion paper, Slater and Gordon Lawyers shared Harry’s experience with IMEs and the Victorian workers’ compensation scheme as a case study.⁹³ Harry spoke with the Review in March 2021. Harry told the Review that due to his age, the impact of his workplace injury was ‘totally different’.

Harry was injured a few years ago when he was in his early 20s. As part of his workplace injury, Harry suffers from post-traumatic stress disorder.

Harry has experienced suicidal thoughts and the agent knew he was concerned about suicide if he was forced to attend an IME appointment.

Harry said that the agent would often organise medical examinations that exacerbated his situation and his suicidal behaviour:

I have had anger issues since the injury and my treating doctor told the insurer that I had [that] issue, but they persisted with their behaviour.

One time [at an IME appointment] I had a meltdown and was asked to leave. I was told to go back to these examinations or else my entitlements will be taken away [...]. I jumped in front of a car [...]. [The agent] did everything they could to convince everyone that I was going to be okay despite objections [about my attending the examination] from my psychologist and my mum. They don’t listen and they don’t care.

Harry’s story highlights the extreme human cost of the failures of the Victorian scheme. The use of IMEs can itself be a cause of unnecessary stress and pressure for workers trying to recover from workplace injuries.

10.121. In my view, it is too early to tell if the Ombudsman's recommendations have been effective in providing for more appropriate use of IMEs. Additionally, when WorkSafe takes on direct responsibility for managing complex claims (Recommendation 7) much of the decision-making on IMEs is likely to fall to WorkSafe. I consider that WorkSafe should review the use of IMEs as part of its development of the Complex Claims Unit. I also consider that the WorkSafe Reform Implementation Monitor should review the use of IMEs.

The rehabilitation of injured workers

10.122. Part 4 of the WIRC Act is concerned with return to work of injured workers.⁹⁴ In 1997, an international consultant’s report concluded that, by international

⁹³ Submission DP45 (Slater and Gordon Lawyers).

⁹⁴ Part 4 is discussed in Chapter 3 from 3.69.

Improving the experience of injured workers

standards, the WIRC Act imposes a high level of responsibility on employers in relation to the rehabilitation of injured workers.⁹⁵ As the report explained:

More than any other factor, the commitment between the employer and the worker will determine the success of rehabilitation.⁹⁶

10.123. The report was referring to the provisions of the 1997 version of the *Accident Compensation Act 1985* (Vic).⁹⁷ If anything, as a result of the 2008 Hanks Review, the responsibilities on employers under part 4 of the WIRC Act are now greater. While much has changed in the scheme in the ensuing 24 years, the ability of an injured worker to return to work remains dependent on the employer for whom they were working at the time they sustained their injury. As Master Builders Victoria, a large employer organisation, acknowledged:

...the important role that employers play in proactively engaging with injured employees in order for them to return to their pre-injury work (or work in any capacity) as soon as it is safe for them to do so.⁹⁸

10.124. It also added that:

... there is only so much an employer can do. Employers are, to a large extent, reliant on claims being properly and actively managed by WorkSafe's agents.⁹⁹

10.125. I am not convinced that the WIRC Act is doing all it can to maximise the return to work of injured workers with complex claims. There are three areas I have identified that could be improved in this regard. The first concerns the obligation of an employer to keep the job of an injured worker open (the so called 'employment obligation period'); the second concerns the skills and training of return to work co-ordinators; and the third concerns the lack of any statutory obligations on WorkSafe in relation to returning injured workers to work. In this section I make recommendations about each of these matters.

The employment obligation period

10.126. As discussed in Chapter 3, the WIRC Act requires an employer to provide an injured worker with suitable or pre-injury employment for the duration of the

⁹⁵ H Allan Hunt et al, *Victorian Workers' Compensation System: Review and Analysis, Volume I* (Report submitted to the Victorian WorkCover Authority, 1997) 7-13.

⁹⁶ Hunt et al (n 95) 9-17.

⁹⁷ WIRC Act pt VI.

⁹⁸ Submission DP41 (MBV) 1.

⁹⁹ Submission DP41 (MBV) 1.

‘employment obligation period’.¹⁰⁰ Generally speaking, the period is an aggregate period of 52 weeks during which the worker has an incapacity for work commencing when the employer receives a claim for compensation from the worker.¹⁰¹ The employer’s duty is qualified by the phrase ‘to the extent that it is reasonable to do so’.¹⁰²

10.127. In consultations I was told that the requirement that an employer must provide suitable employment for (only) 52 weeks is unfair. The Australian Services Union submitted that ‘the scheme should provide incentives to employers to keep injured staff for at least 130 weeks’.¹⁰³ This submission was supported by other unions.¹⁰⁴

10.128. The Law Institute of Victoria urged me to consider whether the existing timeframe is adequate.¹⁰⁵

10.129. The evidence before me is that many workers have their employment terminated after the 12 month period expires.¹⁰⁶ This significantly limits their ability to return to work, even though there is a further 18 months during which they may be receiving weekly payments without having to satisfy the onerous requirements under section 163 of the WIRC Act.¹⁰⁷

10.130. Unions referred to delays that workers can endure in relation to the initial acceptance of a claim and then in approval for surgery.¹⁰⁸ Approval for surgery may come as late as 40 weeks into a claim.¹⁰⁹ In such a case, it is quite unlikely that the worker will be able to return to work within the statutory period.

10.131. The choice of 52 weeks for the period appears to be quite arbitrary. It was introduced in 1989 when an amendment to the *Accident Compensation Act 1985* (Vic) extended the period from the previous period of 26 weeks.¹¹⁰ Under the same amendments, benefits were reduced to 60% of pre-injury average weekly

100 WIRC Act s 103.

101 WIRC Act s 96(1).

102 In any prosecution of an employer under s 103 of the WIRC Act, it would be for the prosecution to prove that it was reasonable for the employer to have complied – see *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249.

103 Submission DP16 (ASU) 6.

104 See, eg, Submissions DP7 (AMIEU), DP30 (HACSU), DP54 (VTHC).

105 Submission DP39 (LIV) 3.

106 See, eg, Submissions DP4 (ANMF), DP8 (ACJI), DP44 (SDA), DP59 (WorkSafe agent, name withheld).

107 See, eg, Submission DP4 (ANMF) 10.

108 See, eg, Submissions DP7 (AMIEU), DP12 (AMWU), DP16 (ASU), DP49 (UFU).

109 See Submission DP16 (ASU) 6.

110 *Accident Compensation (General Amendment) Act 1989* (Vic).

earnings after 12 months if the level of impairment was less than 15 per cent.¹¹¹ This was a significant step down. What is now referred to as the 'employment obligation period' was set at 12 months correspondingly.¹¹²

10.132. In 2006, the 'second entitlement period' was increased from 104 to 130 weeks.¹¹³ The basis for a continuing entitlement of a worker to receive weekly payments of compensation was expressed to be a period 'in respect of which a worker has an incapacity for work resulting from or materially contributed to, by an injury ...'.¹¹⁴

10.133. The same form of words is used in the WIRC Act, which governs entitlement to weekly payments.¹¹⁵

10.134. It is arguable that, to maximise the prospects of an injured worker returning to work, the employment obligation period should continue for as long as the worker is incapacitated for work. This is the position under the South Australian legislation.¹¹⁶ Such a requirement would ensure that workers are given every opportunity to return to work while they are in receipt of weekly payments. This is particularly important given the difficulty of an injured worker returning to work once their employment relationship has ended.

10.135. However, as was recognised by the Hanks Review, the needs of injured workers to have security of employment 'must be balanced with employers' need for commercial security'.¹¹⁷ The question is whether the balance has been struck appropriately. I do not think it has. At present, too much emphasis is placed on the commercial security of employers.

10.136. The evidence is that a worker whose claim exceeds 52 weeks finds it very difficult to return to work. A worker's prospects of returning to work might be significantly improved if their employer was required to keep their job open for longer. This would maintain the employment relationship.

10.137. However, contrary to the submissions of some unions, on the evidence I have heard, I do not consider that a blanket extension of the employment obligation period is justified. There do not appear to be many workers who would return to

111 *Accident Compensation Act 1985* (Vic) s 93B was introduced by the *Accident Compensation (General Amendment) Act 1989* (Vic) s 10.

112 *Accident Compensation Act 1985* (Vic) s 122 was introduced by the *Accident Compensation (General Amendment) Act 1989* (Vic) s 10.

113 See Chapter 3 at 3.38.

114 *Accident Compensation Act 1985* (Vic) s 96(1).

115 WIRC Act ss 160, 162.

116 *Return to Work Act 2014* (SA) s 18.

117 Peter Hanks, *Accident Compensation Act Review: Final Report* (Report, August 2008) 151 ('Hanks Review') 142.

work with their pre-injury employer after 52 weeks, even if their job was still open. But there are undoubtedly some. Everything possible should be done to facilitate their return to work. These attempts should continue for as long as is reasonably necessary, wherever evidence establishes that it will assist, until the end of the second entitlement period. This would maximise outcomes for injured workers and reduce costs for the scheme.

10.138. I propose that a worker or an employer be able to apply to WorkSafe for an extension of the employment obligation period on a case-by-case basis. The entitlement to apply would be triggered by the expiry of 36 weeks of the employment obligation period.¹¹⁸ The worker should be informed of this right by WorkSafe, or, where they are employed by a self-insurer, that self-insurer.

10.139. The worker would need to provide evidence in support of any application to extend the employment obligation period. That evidence would need to show that an extension of the employment obligation period would materially improve the worker's return to work prospects.

10.140. In considering the application, WorkSafe would have to consult with the worker, the worker's employer and anyone else it considers appropriate. If WorkSafe was satisfied that an extension to the employment obligation period would materially improve the worker's prospects of returning to work, WorkSafe should be required to grant the application. WorkSafe should be required to provide reasons for its decision, which would in turn be reviewable under Division 2 of Part 6 of the WIRC Act.

10.141. The amendments to the WIRC Act to give effect to this recommendation should come into effect on 1 January 2022.¹¹⁹

10.142. I note that, where the employment obligation period is extended, it will align the employer's duties under section 103 to provide employment with their other duties under the WIRC Act such as the duty to plan for the return to work of the worker.¹²⁰ It will also align the obligations of an employer under the WIRC Act with its duty to make 'reasonable adjustments' for an employee with a 'disability'

118 Under the WIRC Act s 119(2), a worker is required to be informed when the employment obligation period is to expire.

119 They should be accompanied by a compliance code under s the WIRC Act s 121, to provide guidance to employers, workers and other parties.

120 WIRC Act s 104.

where such adjustments are required in order for the employee to ‘perform the genuine and reasonable requirements of the employment’.¹²¹

Recommendation 16: Employers’ return to work obligations— extending the employment obligation period

Part 4 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to enable a worker with an incapacity for work to apply to WorkSafe for an extension of the ‘employment obligation period’ applying to the worker’s employer. Any such application would need to be supported by evidence of the benefits that would flow to the worker from the extension being granted. An application must be made at least 60 days before the expiration of the employment obligation period.

Upon receipt of an application, WorkSafe must consult with the worker, the worker’s employer and anyone else it considers appropriate. It must grant the application for the period it considers appropriate if it is satisfied that the worker’s prospects of returning to work would materially improve from the extension. The employment obligation period in a particular case must not exceed an aggregate period of 130 weeks.

Return to work coordinators

10.143. A 1997 report by the Upjohn Institute referred to the key role of return to work (RTW) co-ordinators. The report explained that, ‘more than any other position, the RTW Coordinator is key to the access to occupational rehabilitation in Victoria’.¹²²

10.144. Under the WIRC Act, an employer with a total rateable remuneration of \$2,169,670 must ensure that ‘at all times, an appropriate person is appointed to act as the return to work co-ordinator for the employer’.¹²³ A similar obligation is imposed on a smaller employer but only while one of its workers has an incapacity for work.¹²⁴

121 See *Equal Opportunity Act 1995* (Vic) s 20(2) as interpreted in *Dziurbas v Mondelez Australia Pty Ltd* (2015) VCAT 143 and *Butterworth v Independence Australia Services* (2015) VCAT 2056. See also the similar requirements imposed by the *Disability Discrimination Act 1992* (Cth) as explained by the Federal Court of Australia in *Watts v Australia Postal Corporation* (2014) 222 FCR 220 at [23]-[24].

122 Hunt et al (n 95) 7-30.

123 WIRC Act s 106(1).

124 WIRC Act s 106(2).

- 10.145. The Upjohn Institute Report noted that while employers were required to nominate return to work co-ordinators, there is no requirement 'for such individuals to have specific training'.¹²⁵
- 10.146. The Hanks Review also considered that 'the role of return to work coordinators is critical to the overall return to work process'.¹²⁶ Hanks also observed that, despite this, there is no requirement for the nominee to be trained to perform the role.¹²⁷ The Hanks Review contrasted the position with that prevailing in New South Wales and Queensland where training was at the time mandatory.¹²⁸ I note that the requirement was relaxed in Queensland but the 2018 Peetz Review recommended it be re-instated.¹²⁹ South Australia now also requires RTW co-ordinators to be trained.¹³⁰
- 10.147. The Hanks Review did not recommend that training for return to work co-ordinators be made mandatory out of a concern that 'for some employers, especially those who have few claims, mandatory training may impose an unreasonable cost'.¹³¹ Ultimately, Hanks' recommendation that 'a more flexible approach' be developed is now reflected in the requirement that 'an appropriate person' be appointed to the role.
- 10.148. The WIRC Act provides some limited guidance on the meaning of 'appropriate':
- (6) In this section, "appropriate person" means a person who has an appropriate level of seniority and is competent to assist an employer to meet the obligations of the employer under this Part.
 - (7) A person is competent to assist an employer to meet the obligations of the employer under this Part if the person has knowledge, skills or experience relevant to planning for return to work including—
 - (a) knowledge of the obligations of employers and workers under this Part; and
 - (b) knowledge of the compensation scheme provided for under this Act ... and the functions of the Authority and, if relevant, self-insurers under this Part.¹³²

125 Hunt et al (n 95) 7-30.

126 Hanks Review (n 117) 151.

127 Hanks Review (n 117) 148.

128 Hanks Review (n 117) 149.

129 Peetz (n 9) 59, see Recommendation 6.8.

130 See *Return to Work Act 2014* (SA) s 26(5)(c).

131 Hanks Review (n 117) 151.

132 WIRC Act ss 106(6)–(7).

10.149. A return to work co-ordinator will have the primary responsibility to ensure that their employer meets its return to work responsibilities under the WIRC Act including:

- planning the return to work of injured workers;¹³³
- consulting about the return to work of a worker;¹³⁴
- making return to work information available;¹³⁵
- co-operating where appropriate with labour hire employers;¹³⁶ and
- assisting return to work inspectors in the exercise of their powers.¹³⁷

10.150. In my view, given these crucial roles, the time has come for a requirement that Victorian employers ensure that their return to work co-ordinators are appropriately trained. I note that health and safety advisers who must be employed or engaged by all employers (and will often be the same person as the return to work co-ordinator) must be 'suitably qualified'.¹³⁸ Similarly, employee health and safety representatives elected under the OHS Act 2004 must receive training if they request it.¹³⁹

10.151. As part of WorkSafe's recommended expanded role in return to work, I consider that WorkSafe should determine the appropriate training that return to work co-ordinators should receive to carry out their statutory function. This is a role WorkSafe already plays in relation to training for health and safety representatives¹⁴⁰ and authorised representatives of registered employee organisations under the OHS Act 2004.¹⁴¹ WorkSafe should consult with the WorkCover Advisory Committee as part of this process.¹⁴² Because many return to work co-ordinators will already be trained, there will need to be a process by which existing training is recognised.

133 WIRC Act s 104.

134 WIRC Act s 105.

135 WIRC Act s 107.

136 WIRC Act s 109.

137 WIRC Act ss 142-143.

138 *Occupational Health and Safety Act 2004* (Vic) s 22(2)(b) ('OHS Act').

139 OHS Act s 67. A recommendation by the Maxwell Review of 2004 that there be a requirement that they be trained was not implemented: Chris Maxwell, *Occupational Health and Safety Review* (Final Report, March 2004) 895.

140 OHS Act s 69(1)(d)(ii).

141 OHS Act s 81(b).

142 WorkSafe is required to consult with the OHS Advisory Committee before approving training courses for 'authorised representatives' (people authorised to hold an 'entry permit') under the OHS Act s 82.

Recommendation 17: Return to work co-ordinators should be trained

Section 106 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to impose a duty on an employer to:

- provide a return to work co-ordinator with the assistance and facilities reasonably necessary for the return to work co-ordinator to perform their functions under the Act;
- ensure that a return to work co-ordinator has received such training as is determined by WorkSafe and published from time to time on its website.

WorkSafe’s return to work role

10.152. The role of employers in the return to work process has been described above. By contrast, WorkSafe’s responsibilities are largely limited to regulating the operation of Part 4 of the WIRC Act.¹⁴³ Part 4 establishes the ‘Return to Work Inspectorate’ which is responsible for enforcing the obligations of employers under Part 4.

10.153. WorkSafe’s limited statutory role under the WIRC Act may be contrasted with the active role that the South Australian Return to Work Corporation performs under the *Return to Work Act 2014* (SA), section 15 of which provides:

- (1) The Corporation, in acting under and for the purposes of this Act, must—
 - (a) adopt a service-orientated approach that is focused on early intervention and the interests of workers and employers; and
 - (b) seek to act professionally and promptly in everything that it does; and
 - (c) be responsible and accountable in its relationships with others; and

¹⁴³ Under s 119(2)(b), a worker may ‘request the Authority ...to provide more information in respect of return to work’ but there is no corresponding obligation imposed on the Authority.

Improving the experience of injured workers

(d) without limiting a preceding paragraph, take reasonable steps to comply with any request made by a worker under section 15(2).¹⁴⁴

(2) The 'Return to Work Corporation of South Australia' must take various steps in relation to returning injured workers to work. This includes developing and maintaining plans or strategies with the objective of:

(a) ensuring early and timely intervention occurs to improve recovery and return to work outcomes including after retraining (if required); and

(b) achieving timely, evidence-based decision-making that is consistent with the requirements of the legislation; and

(c) wherever possible, providing a face to face service where there is a need for significant assistance, support or services; and

(d) ensuring regular reviews are taken in relation to a worker's recovery and, where possible, return to work; and

(e) ensuring the active management of all aspects of a worker's injury and any claim; and

(f) encouraging an injured worker and his or her employer to participate actively in any recovery and return to work processes; and

(g) minimising the risk of litigation.¹⁴⁵

10.154. The South Australian Corporation is also required to take reasonable steps to ensure that a reasonable level of recovery and return to work services are provided to an injured worker. It must also take reasonable steps to ensure that the recovery and return to work services will be provided by persons accredited, approved or appointed by the corporation.¹⁴⁶

10.155. Such provisions are important. They clearly articulate parliament's intent that the manager of the South Australian scheme is not a disinterested 'umpire' but rather is a key player in the return to work process. The statutory provisions

144 Section 15(2) provides that 'a worker may reasonably request the Corporation to review the provision of any service to worker under this Act or to investigate any circumstance where it appears that the worker's employer is not complying with any requirement of this Act as to the retention, employment or re-employment of the worker.

145 *Return to Work Act 2014 (SA)* s 13(2).

146 *Return to Work Act 2014 (SA)* ss 24(4), 24(5).

inform the ‘strategic direction’ of the Return to Work Corporation as articulated in its most recent annual report..¹⁴⁷

10.156. WorkSafe should have a clear legislative responsibility to actively manage claims and to treat injured workers with dignity and respect.

Recommendation 18: WorkSafe to actively manage claims

Section 97 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended by adding before paragraph (a):

That WorkSafe actively manage all aspects of a worker’s injury and any claim under this Act by ensuring timely intervention occurs to improve recovery and return to work outcomes.

Recommendation 19: WorkSafe to treat workers with dignity and respect

Section 492 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended by adding after paragraph (c):

Ensure that workers who suffer injuries at work receive high-quality service and are treated with dignity and respect.

Statutory objects of the Victorian workers’ compensation scheme

10.157. A submission from a trade union observed that ‘the objectives of the [workers’ compensation] scheme make no mention of providing adequate care for injured workers, or ensuring their medical needs are met. Instead, there is emphasis on containing the costs of the scheme’..¹⁴⁸

10.158. The objectives of the WIRC Act are set out in section 10. I outlined these objectives in Chapter 3. I consider that the objectives of the WIRC Act are out of

¹⁴⁷ ReturnToWorkSA, *Annual Report 2019-20* (Report 2020) 19-46.

¹⁴⁸ Submission DP7 (AMIEU) 2.

date. They have been essentially unchanged since the 1992 amendments to the *Accident Compensation Act 1985 (Vic)* that ushered in the WorkCover scheme.¹⁴⁹ They do not adequately reflect the active claims management role that I recommend WorkSafe should have under the reforms outlined in Chapter 9.

Recommendation 20: Amend the objectives of the Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)

Section 10 of the *Workplace Injury Rehabilitation and Compensation Act 2013 (Vic)* should be amended by the addition of the following objectives:

- To ensure that injured workers or dependants are treated fairly by WorkSafe; and
- To ensure that workers who suffer injuries at work receive high-quality service and are treated with dignity and respect.

¹⁴⁹ *Accident Compensation (WorkCover) Act 1992 (Vic)* s 4 replaced *Accident Compensation Act 1985 (Vic)* s 3.

11. Financial health of the scheme and emerging risks

Key points

- The Terms of Reference to the Review require me to consider the financial sustainability of the scheme.
- In assessing the financial sustainability of the scheme, I have considered the impact of the changes recommended in this report, as well as the potential impact of emerging risks.
- WorkSafe has assisted the Review by providing high-level costings of three major options that I have considered in this report.

Purpose of the chapter

- 11.1. The purpose of this chapter is to consider the financial implications of the Review's recommendations and how they affect the financial sustainability of the Victorian workers' compensation scheme.
- 11.2. The chapter assesses the financial sustainability of the scheme from the following perspectives:
 - What one-off costs will be incurred in implementing the recommendations in this Review?
 - How will the implementation of the recommendations in this Review impact the financial sustainability of the scheme?
 - What impact might emerging risks have on scheme sustainability?

Financial Sustainability

- 11.3. Paragraph 18 of the Terms of Reference requires that in forming my recommendations, I must have regard to 'the implications of any changes for the financial viability of the workers' compensation scheme and the cost of WorkCover insurance for employers'.
- 11.4. When introducing the 'Provisional Payments' amendments to the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ('WIRC Act') in 2021, the

Improving the experience of injured workers

then Minister for Workplace Safety, the Hon Jill Hennessy, referred to the financial implications of the changes:

Whilst provisional payments for mental injury will create additional costs to the scheme, this upfront investment of early intervention to assist injured workers with mental injuries to receive treatment as soon as possible, will increase return to work prospects and shorten the duration of time off work. This ultimately will save the scheme costs later down the track by preventing longer term claims.¹

- 11.5. I anticipate that, over time, the changes to claims management that I recommend will have a similar financial effect. There are likely to be some short term increases in expenditure to cover increased salaries to attract the right workforce, but the individualised case management that will be provided to injured workers, especially those with mental injuries, should improve return to work rates and ultimately save the scheme money. This is clearly a matter that both WorkSafe and the WorkSafe Reform Implementation Monitor should focus upon in the oversight of the changes.

Financial implications of options

- 11.6. In responding to the options paper, and at my request, WorkSafe prepared financial costings for Options 4, 5 and 7.² The purpose of these costings is to provide some information about the likely financial impact of the implementation of the options as required by the Terms of Reference.
- 11.7. Options 4, 5 and 7 were selected by WorkSafe after discussions with me, on the bases that these options were the ones I was seriously considering at that stage of the Review and they also had the potential to have the most significant financial impacts on the scheme. Option 1 was the status quo and Options 2 and 3 would only have a direct effect on the agents not WorkSafe, while Option 6 (the 'hybrid model') was too uncertain in parameters (in terms of how and to what extent WorkSafe would handle claims) to allow meaningful costings to be carried out at that point in time.
- 11.8. The costings were prepared prior to the formation of my recommendations contained in this Report and my preference for Option 5. WorkSafe's assumptions do not necessarily reflect my vision for Options 4, 5 and 7.

¹ Victoria, *Parliamentary Debates*, Legislative Assembly, 26 November 2020, 3730 (Jill Hennessy, Attorney-General).

² The seven options included in the Options Paper released by the Review in December 2020 are described at 9.71 of Chapter 9. The Options Paper is reproduced at Appendix F.

- 11.9. In preparing these costings, WorkSafe was required to make many assumptions about Options 4, 5 and 7, including specific details of these options, and how they may evolve or be implemented. WorkSafe's costings are preliminary only and the plans, costs, and risk assessments have not been subject to formal analysis and review.³
- 11.10. It is important to note that these assumptions are WorkSafe's alone. The costings provided by WorkSafe must be considered together with WorkSafe's assumptions for Options 4, 5 and 7 which are explained below.

WorkSafe's assumptions

Complex claims

- 11.11. WorkSafe has based its costings on a definition of 'complex claims' that is broader than the 130+ week definition provided by the Ombudsman⁴ and found within the Review's Terms of Reference.⁵
- 11.12. WorkSafe's costings are based on an estimate that approximately 20% of new claims in a year could be categorised as 'complex'. WorkSafe acknowledges that there is some uncertainty in ascertaining with any precision, the proportion of claims which would be complex.
- 11.13. The 20% estimate uses a definition of 'complex claims' that categorises claims according to the recovery support needs of injured workers. WorkSafe expects that approximately 70% of new claims would fall within a 'low touch guided stream', 15% within a medium level of claims management known as the 'supported stream', and 15% within a higher level of claims management known as the 'assisted stream'.⁶ (Further details of these categories are set out below at 11.17).
- 11.14. The 20% estimate for complex claims is based on the initial cohort of 15% of claims estimated to be in the 'assisted stream', together with an additional 5% of claims initially assigned to the 'supported stream' that may later require reallocation to the 'assisted stream' as complexities in the injury or worker's

3 WorkSafe Victoria, 'IR Costs Discussion' (Presentation slides, 29 March 2021) 1.

4 Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019) ('Victorian Ombudsman 2019').

5 Terms of reference, para 13.

6 WorkSafe Victoria, 'IR Options Analysis' (Presentation slides, 4 March 2021) 4-5.

Improving the experience of injured workers

circumstances become apparent.⁷ An example would be a physical injury claim where the worker develops a secondary mental injury or requires surgery.

11.15. Based on its experience, WorkSafe estimates that the workload resulting from this 20% of new claims is approximately 50% of the total claims management workload.⁸ This is because complex claims generally require more intensive support at the initial stage, and continue in the scheme for a longer period of time.

Details of stream allocation/triage approach that form the basis of WorkSafe's 'complex claims'

11.16. WorkSafe's needs-based approach to segmenting claims has three categories:

- 'Guided';
- 'Supported'; and
- 'Assisted'.

11.17. The categories have the following characteristics:⁹

Guided	<ul style="list-style-type: none">• Worker has an injury where full recovery is expected quickly• Worker has returned to work or is expected to do so in the short term• Good employer compliance and case performance history• Self-supported, little if any additional support required
Supported	<ul style="list-style-type: none">• Worker has an injury or injuries where a longer recuperation is expected• Worker or employer unable to self-manage their case (e.g.: worker has no experience in managing an injury)• Needs for hands on support in facilitating recovery• Presence of barriers to recovery
Assisted	<ul style="list-style-type: none">• Worker has a more serious injury or multiple injuries, likely to have long-term effects• High needs for support services• Significant barriers to recovery• Access to multiple different services needed (e.g. home modifications)

7 WorkSafe Victoria, IR Options Analysis (n 6) 6.

8 WorkSafe Victoria, IR Options Analysis (n 6) 6.

9 Note, 0.1% of cases require lifetime care and are managed by the Transport Accident Commission's Community Integration Programme: WorkSafe Victoria, IR Options Analysis (n 6) 5.

Improving the experience of injured workers

- 11.18. Defining complex claims from a needs-based perspective embeds the following factors:
- *Injury type*: For example, compounded injuries, mental injury, spinal injury.
 - *Projections of likely return to work*: For example, unlikely to return to work, unlikely to return to work after two years, unlikely to return to work at original employer within two years.
 - *Claim duration*: There would be checkpoints of claim duration once claims exceeded certain points, for example, 13 weeks, 52 weeks and 130 weeks.

Triage approach based on needs

- 11.19. WorkSafe's costings have been prepared on the basis that WorkSafe will triage claims into the 'Guided', 'Supported' and 'Assisted' segments.
- 11.20. WorkSafe described the triage model as a continuous process. Cases may be transferred from one team to another, or depending on the model, between agents and WorkSafe.
- 11.21. WorkSafe also pointed out to me that the triage model will also evolve over time. While WorkSafe does not presently have comprehensive automated triage systems, it anticipates being in a position to implement such systems in the future.

WorkSafe's approach to costing Options 4, 5 and 7

- 11.22. WorkSafe has separated its costings into two parts: the delivery model and the service model.
- 11.23. The delivery model focuses on *who* delivers the services within the service model, that is whether WorkSafe or the agents have responsibility for day to day management of claims.
- 11.24. The service model focuses on *how* services are delivered to injured workers and employers. For example, the level of claims management involved in dealing with particular claims and the IT systems used for triaging claims.
- 11.25. I note that the service model costed by WorkSafe is not based on any recommended changes to service delivery made by my Review, but rather based on proposed service model changes considered necessary or optimal by WorkSafe.

Change in delivery model—no changes to existing service model

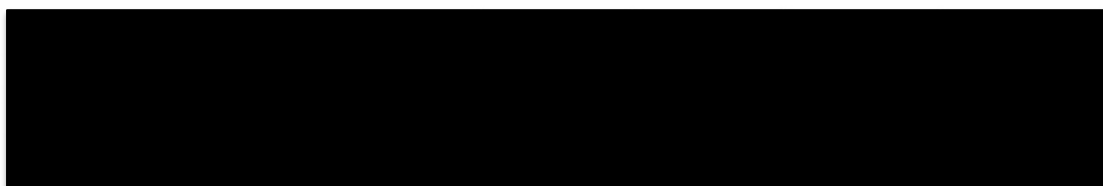
- 11.26. WorkSafe's estimated annual operations costs based on the introduction of delivery models aligned to Options 4, 5 and 7, in comparison with current costs, are set out in Table 9. The figures refer to \$ million.

Improving the experience of injured workers

11.27. As reflected in the table, once the annual ongoing costs for agents are offset against the annual ongoing costs for WorkSafe, there is predicted to be relatively minimal ongoing annual cost differences between the various options.

11.28. Compared to the status quo, Option 4 is estimated to cost the scheme a [REDACTED], Option 5 between \$20 and \$50 million per annum, and Option 7 [REDACTED].

Table 9: [REDACTED]



11.29. Some of WorkSafe's key assumptions in calculating these costs include:

- That WorkSafe's service model will be its existing one, implying that the delivery model would be implemented prior to the service model. The costs do not consider the service model transformation WorkSafe expects to implement in the future. The proposed transformation programme is expected to substantially improve the service model while reducing ongoing operational costs
- The levels of full-time employees will be broadly similar to that of the current agent model. This is driven by the service model, being the nature of the services, and the manner in which people go about delivering them, together with the capability of employees, the supporting technology and tools, and decisions on caseloads.
- The estimated numbers and experience levels of claims staff are based on the current structure of one of the agents. WorkSafe selected a single agent whose structure is broadly representative of all agents in the scheme.
- An average salary of \$145,000 for full time employees, based on existing average, fully loaded, salary rates.

11.30. On the basis of these assumptions, WorkSafe estimates it will need [REDACTED] additional claims processing staff under Option 4, 820 under Option 5 and [REDACTED] under Option 7. These numbers reflect the numbers of staff who would be directly involved in claims management functions and exclude the increased staff requirements of WorkSafe's corporate functions.¹⁰

¹⁰ WorkSafe Victoria, IR Options Analysis (n 6) 12; WorkSafe Victoria, IR Costs Discussion (n 3) 2.

11.31. WorkSafe also noted the following in relation to the costs in Table 9:¹¹

- The costs estimates include the additional staff required in WorkSafe’s corporate functions (e.g. finance, human resources, risk etc) to accommodate the additional claims staff.
- If there is no change in service model, productivity, caseloads, or effectiveness, full-time equivalent staff level would be broadly comparable.
- The agent profit in remuneration is ‘saved’ and is available to fund any differential in salary and other costs of employment.
- The key determinants of the long term run cost are the service model, its effectiveness at improving outcomes, and the efficiency of its delivery.

11.32. In consultation, WorkSafe advised me that they had not built in any projected efficiencies or savings for these, or any other costings set out in this section.¹²

One-off costs to deliver Options 4, 5 and 7

11.33. WorkSafe also provided estimated one-off implementation costs for Options 4, 5 and 7, over a five year period. These costs would be spread over the five year period (not incurred cumulatively annually over that period).

11.34. WorkSafe’s estimated one-off programme costs over a five year period for Options 4, 5 and 7, are set out in Table 10. The figures refer to \$ million.

¹¹ WorkSafe Victoria, IR Options Analysis (n 6) 12; WorkSafe Victoria, IR Costs Discussion (n 3) 2.

¹² Consultation 43 (WorkSafe Victoria, session 4).

Table 10: One-off implementation costs to deliver Options 4, 5 and 7¹³

		Option 4	Option 5	Option 7
Programme		20		
Service Model Design		25		
Staff		50		
Premises		55		
Transition		60		
	<i>which includes</i> Disruption	50		
Integration				
Service Model delivery		205		
	<i>which includes Transformation</i>	50		
	<i>Platforms</i>	155		
Contingency	20%	80		
		495		

11.35. WorkSafe noted the following in relation to Table 10:¹⁴

- The costs include both implementation of a new delivery model and service model, based on Options 4, 5 and 7.

¹³ WorkSafe Victoria, IR Costs Discussion (n 3) 5.

¹⁴ WorkSafe Victoria, IR Options Analysis (n 6) 25; WorkSafe Victoria, IR Costs Discussion (n 3) 4.

Improving the experience of injured workers

- WorkSafe’s view is that the desired outcomes cannot be achieved without both the new delivery model and the new service model.
- For the purpose of the costing estimates, WorkSafe has used their own proposed new service model, based on ‘analytically driven needs identification leading to tailored support delivered through a “person centric” model’.
- WorkSafe estimates that the new service model would bring about a reduced operating cost by ‘digitising services, enhancing online and real time capabilities and eliminating administrative work’, resulting in savings of annual ongoing operations costs of approximately \$50 million per annum, with a ten year saving in today’s dollars (net present value) of approximately \$250 million.
- [REDACTED]
- Programme costs include staff recruitment, onboarding and training, premises setup, and core technology infrastructure establishment. Costs will vary depending on, for example, premises availability and potential further relocations or consolidation.
- Service model cost estimates includes payments, claims, recovery and provider. Service model costings exclude premium and legacy platform decommission. Cost estimates for triage, eligibility, lodgement, case processing and service model are based on done by WorkSafe already.

11.36. As discussed above, WorkSafe’s proposed service model is based on prior work carried out by WorkSafe,¹⁶ not on recommendations contained in this Report.

11.37. Therefore, I do not consider that I am in a position to comment directly on the need or otherwise for the specific service model changes proposed by WorkSafe. It may be that the changes I recommend in this Report may alter WorkSafe’s proposed new service model and the costs involved in implementing the new service model.

11.38. One matter that I consider worthy of comment concerns WorkSafe’s current in-house costs associated with the management of claims. As noted in Chapter 4, WorkSafe oversees the claims management functions of its agents in a number of ways including by maintaining the claims manual, auditing their operations, training their staff and operating the various dispute resolution processes.

15 [REDACTED]

16 WorkSafe Victoria, IR Costs Discussion (n 3) 4.

- 11.39. In WorkSafe’s most recent annual report, WorkSafe records that in 2019-20, it expended \$125 million (or 25% of its budget) on ‘insurance and claims management’ and a further \$61 million (10% of its budget) on ‘dispute resolution’.¹⁷
- 11.40. At least the first of these figures and possibly the second must be considered in any assessment of the current cost of the agent model.

Emerging risks in workers’ compensation

- 11.41. I agree with the Peetz Review of the Queensland workers’ compensation system that ‘it is essential that the workers’ compensation system maintain pace with developments in the labour market and the economy’.¹⁸ To this I would add that the system must adapt to events in society more generally such as the COVID-19 pandemic.

Financial challenges

- 11.42. In the 2019-2020 financial year, the WorkSafe scheme reported a net result deficit of \$3 billion (\$2.9 billion below target), with the ‘performance from insurance operations’ resulting in a deficit of \$3.5 billion (\$3.4 billion below target).¹⁹
- 11.43. WorkSafe attributed this deficit to ‘the considerable economic impacts of COVID-19’ and the continued increase in the number of workers with mental injury claims, who often take longer to recover and require more services and support.²⁰
- 11.44. Despite the significant deficit, WorkSafe retained an insurance funding ratio of 123%. The funding ratio means that WorkSafe holds \$123 in assets for every \$100 of liabilities.²¹ Ratios over 100% indicate that ‘the scheme has more than sufficient assets to meet its predicted future liabilities’.²² The observation in

17 WorkSafe Victoria, *Annual Report 2020*, 51 (‘WorkSafe Annual Report 2020’).

18 David Peetz, *The Operation of the Queensland Workers’ Compensation Scheme: Report of the Second Five-Yearly Review of the Scheme* (Report, 27 May 2018) page xxvii.

19 WorkSafe Annual Report 2020 (n 17) 51. The insurance operations deficit appears to have been partly offset by an increase in the sale of investments between 2018-2019 to 2019-2020 (WorkSafe Annual Report 2020) 64.

20 WorkSafe Annual Report 2020 (n 17) 6.

21 WorkSafe Annual Report 2020 (n 17) 6.

22 Safe Work Australia, *Comparative Performance Monitoring Report, Part 3 – Premiums, Entitlements and Scheme Performance*, January 2020, (Safe Work Australia 2020) 27; see also 41-43.

WorkSafe's most recent annual report that its 'balance sheet remains strong' therefore appears justified.²³

- 11.45. The average premium rate in 2019-20 was 1.272% for the sixth year in a row.²⁴ Only Queensland, Western Australian and the Comcare schemes have lower average premiums.²⁵

Impact of COVID-19 pandemic

- 11.46. WorkSafe's financial results were significantly impacted by the COVID-19 pandemic through reduced premiums payable by employers who suspended or ceased operating, or employed fewer staff. The pandemic also reduced investment revenue—the impact of COVID-19 on global financial markets resulted in an investment return lower than the expected long-term rate of return for 2019-2020.²⁶
- 11.47. In the short term, the incidence of work-related COVID-19 claims in Victoria may have been partly offset by a decline in other sources of workplace injuries, because many high-risk industries (such as manufacturing and transport) were restricted or shut down. The 2020 WorkSafe Victoria annual report reports on claims data for the 2019-2020 financial year. This means the overall impact of the COVID-19 pandemic post 30 June 2020 is not yet reflected in published statistics. However, WorkSafe reported a 0.80% decrease in claims per million hours worked for the 2019-20 financial year as compared to the 2018-19 financial year. This is due in part to the decrease in hours worked from April to June 2020 as a result of COVID-19 restrictions.²⁷
- 11.48. The cost of existing claims increased in the 2019-20 financial year through extended eligibility for weekly payment compensation, and workers being unable to return to work or access allied health or vocational rehabilitation services.²⁸ Some workers became eligible for additional weekly payments during the COVID-19 pandemic. Workers were entitled to receive up to an additional six months of weekly payments between 1 December 2019 and 23 October 2020, if their 'second entitlement period' would have otherwise expired or they

23 WorkSafe Annual Report 2020 (n 17) 51.

24 WorkSafe Annual Report 2020 (n 17) 52.

25 Safe Work Australia 2020 (n 22) 39.

26 WorkSafe Annual Report 2020 (n 17) 86.

27 WorkSafe Annual Report 2020 (n 17) 5.

28 WorkSafe Annual Report 2020 (n 17) 51.

received a notice terminating their weekly payments during this period.²⁹ These additional costs are likely to be reflected in financial reporting for 2020-21.

- 11.49. The recent and emerging nature of the COVID-19 pandemic means that research into its long-term impacts on workers' compensation is still in its infancy. Preliminary international research points to the potential for long term claims arising from COVID-19 workplace infections. It appears that a significant number of people infected with COVID-19 (around 10%) may continue to experience a range of often unique symptoms and disability, often on a chronic or relapsing basis.³⁰ This may create a need for a new or altered approach to both diagnostic and return to work practices for these claims.
- 11.50. The number of workers continuing to work from home may also increase claims relating to workers' home workplaces. Employers have less oversight of ergonomic and general health and safety issues that may arise in a worker's home office. An increase in injuries occurring at home workplaces may lead to more testing of how the scope of the 'arising out of, or in the course of employment' element of entitlement to compensation is applied in a home context.³¹

Mental health injuries

- 11.51. WorkSafe is also seeing continued growth in new claims for mental health injuries. In 2019-20, 14.3% of claims were for mental injuries, which had increased from 12.6% of claims received by WorkSafe in 2017-18.³² WorkSafe predicts that the proportion of all claims which are mental injury claims will reach 33% of claims before 2030.³³
- 11.52. This increase in mental health injuries is not limited to Victoria, with increases in mental health injuries recorded across Australia.³⁴

29 *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) s 623N. The 'second entitlement period' is discussed in Chapter 3 at 3.38.

30 University of California, Davis, 'COVID-19 "long hauler" patients search for answers and help' (Web Page, 22 October 2020) <<https://health.ucdavis.edu/health-news/newsroom/covid-19-long-hauler-patients-search-for-answers-and-help/2020/10>>.

31 See, eg, WIRC Act s 5(1).

32 WorkSafe Annual Report 2020 (n 17) 1.

33 WorkSafe Victoria, *Annual Report 2018-2019* (Report, 2019) 19.

34 Angela Brookes, Hall and Wilcox, 'COVID-19 and Mental Health Claims – Emerging Trends' (Web Page, 21 October 2020) <<https://hallandwilcox.com.au/thinking/covid-19-mental-health-claims-emerging-trends/>>.

Improving the experience of injured workers

11.53. Mental injury claims on average receive compensation payments nearly two and a half times higher than claims generally, and the duration of time off work by a worker with a mental injury claim is nearly three times greater.³⁵

11.54. When surveyed, Australians with mental health claims:

- perceive themselves as having a significantly lower ability to work than those with physical injury claims;³⁶
- were more likely to describe co-morbidities;³⁷ and
- gave poorer ratings for their claim and return to work experiences with their employer.³⁸

11.55. While most physical injury claims are assessed and accepted quickly, mental injury claims are frequently 'held pending' and often require the legislated 28 days to determine liability.³⁹ This process can delay a worker's access to compensation for medical and rehabilitation services. Historically, WorkSafe rejected nearly half of mental health injury claims made.⁴⁰

11.56. In recent years, a number of legislative and policy reforms have been made that aim to improve the experience of workers with mental health injury claims.

11.57. The principal legislative reform has been the introduction of 'provisional liability payments' for mental injury claims which are to take effect from 1 July 2021 or, at the latest, 1 January 2022. Workers with mental injury claims will be entitled to compensation for the reasonable costs of medical treatment relating to the injury

35 Safe Work Australia data from 2010-11 to 2014-15 indicates average compensation paid on mental injury claims was \$24,500 compared to \$9000 for all claims; and average time lost was 15.3 weeks compared to 5.5 weeks for all claims. Safe Work Australia, Mental Health (Web Page): <<https://www.safeworkaustralia.gov.au/topic/mental-health#snapshot-of-claims-for-mental-health>>.

36 Workers surveyed provided an average 'work ability' score of 8/10, however those with mental health claims scored an average of 6.5/10. Safe Work Australia, *National Return to Work Survey 2018 - Summary Report* (Report, September 2018) 19 ('Return to Work Survey 2018').

37 50.4% of workers with mental health claims described suffering additional conditions, compared to 33.8% of the surveyed population as a whole. Return to Work Survey 2018 (n 36) 30.

38 Return to Work Survey 2018 (n 36) 37-39.

39 Australian data indicates an average claim eligibility decision delay of 27 days for mental health claims and just six days for all claims: SE Gray et al, 'Determining the Association Between Workers' Compensation Claim Processing Times and Duration of Compensated Time Loss' (Presentation, Insurance Work and Health Group, Monash University, 2018).

40 In October 2015, 44.5 % of police mental health claims were rejected, compared to just 4.7 % of claims involving physical injuries: Nick McKenzie, Richard Baker and Nick Toscano, 'Dirty tactics by insurance companies make injured workers miserable', *The Age* (Online, 16 September 2016) <<https://www.theage.com.au/national/victoria/dirty-tactics-by-insurance-companies-make-injured-workers-miserable-20160909-grd648.html>>.

Improving the experience of injured workers

for up to 13 weeks. Provisional payments are made prior to a claim decision or even where the claim is rejected.⁴¹

11.58. Policy initiatives introduced since 2018 include:

- An increase in the number of specialist mental health resources embedded in each agent, from five (one per agent) to 15.⁴² These mental health specialists, as required by the APA Business Rules (Mobile Case Management) (since 2018-19), must be currently registered with the Psychology Board of Australia, unless otherwise approved in writing by WorkSafe prior to commencement of the relevant APA year.⁴³
- Mental health specialists are required to have a relevant background in the management of mental health, and can include qualified psychologists, mental health nurses, social workers or occupational rehabilitation providers who have supported workers with a mental injury.
- All accepted primary mental injury claims are reviewed by the mental health specialists;⁴⁴
- Mobile case managers dedicated to providing support on complex mental injury claims;⁴⁵
- A 'facilitated discussion' service delivered by accredited mediators to address workplace interpersonal conflict;⁴⁶ and
- A \$25 million Mental Health Improvement Fund partnership between WorkSafe and the Department of Health and Human Services, resulting in the 'Workwell website', 'Workwell toolkit', mental health improvement projects and industry learning networks to promote mentally healthy workplaces.⁴⁷

'Gig' or on-demand work

11.59. In recent years there has been significant growth in the size of the workforce engaged in on-demand work organised through online platforms. Platform work

41 *Workplace Injury Rehabilitation and Compensation Amendment (Provisional Payments) Act 2021* (Vic) s 263.

42 Email from [REDACTED] to Kirsten McKillop, Director – Independent Agent Review, 16 March 2021.

43 WorkSafe Victoria, 'Draft Agent Remuneration, Mobile Case Management (MCM) Business Rules, Annual Performance Adjustment 2020/21' (Business Rules, 12 June 2020) 5.

44 Email from [REDACTED] to Kirsten McKillop, Director – Independent Agent Review, 16 March 2021.

45 Email from [REDACTED] to Kirsten McKillop, Director – Independent Agent Review, 16 March 2021.

46 Of the 11,000 workers who accessed occupational rehabilitation in 2019-20, 169 used the facilitated discussion service. WorkSafe Annual Report 2020 (n 17) 43.

47 WorkSafe Annual Report 2020 (n 17) 31.

is statistically small, but a significant and growing part of the labour market.⁴⁸

This type of work, often referred to as 'gig work', involves workers being sourced on an as-needs basis.

- 11.60. Gig work can be very dangerous. A number of fatalities among food delivery riders in New South Wales in 2020 led to the creation of an investigative Taskforce lead by SafeWork NSW and Transport for NSW in November 2020.⁴⁹
- 11.61. Most platforms do not engage workers as employees, meaning workers may not be extended the entitlements and protections of labour regulation.⁵⁰
- 11.62. Platform workers who are employees are entitled to compensation for workplace injuries under the WIRC Act. However, there is some complexity and uncertainty about whether and how the WIRC Act applies for non-employee platform workers.⁵¹ Some platform businesses pay premiums for WorkCover insurance. As at November 2019, 58 WorkSafe insurance claims by on-demand workers had been accepted.⁵²
- 11.63. In late 2018, following concern over wages and conditions offered to on-demand workers, the Victorian government commissioned an inquiry into the Victorian On-Demand Workforce (Inquiry).
- 11.64. The Inquiry's report, released in July 2020, makes it clear that the growth in platform work has the potential to change the nature of the labour force. Without legislative reform, one implication may be that fewer 'working' Victorians are covered by the workers' compensation scheme. This number could increase as platform work gains a greater share of the labour market.
- 11.65. The Inquiry made twenty recommendations. One of these was that Victoria should resolve the current ambiguity around the operation of existing health and safety and accident insurance laws to ensure that platform workers' health and safety is appropriately protected and may be appropriately compensated for work-based injuries.⁵³

48 Natalie James, *Report of the Inquiry into the Victorian On-Demand Workforce* (June 2020) 24.

49 SafeWork NSW, 'New Taskforce to Investigate Gig Economy Deaths', (Media Release, 24 November 2020)

<<https://www.safework.nsw.gov.au/news/safework-media-releases/new-taskforce-to-investigate-gig-economy-deaths>>.

50 James (n 48) 8.

51 James (n 48) 116.

52 James (n 48) 122.

53 James (n 48) 194.

- 11.66. The Victorian government invited the public to make submissions about the recommendations. Submissions closed in October 2020. The government is yet to publish its response.⁵⁴
- 11.67. As it was outside my Terms of Reference, I have not heard enough evidence about the application of the WorkSafe system to the gig economy to make any specific recommendation. I support the recommendation made in the James Inquiry's Report referred to above. I also recommend that the scheduled review of the scheme in 2024 (see Recommendation 9) examine the relevant research and the data held by WorkSafe on the application of the workers' compensation scheme to platform work.

Labour hire

- 11.68. A number of submissions to this Review have noted that one factor that can lead to complexity in a workers' compensation claim is if the injured worker was working for a labour hire employer at the time of their injury.⁵⁵ This is likely to be because of the particular challenges such workers face in returning to work.
- 11.69. It was noted in Chapter 3 that the Victorian workers' compensation scheme places the primary obligation for returning an injured worker to work on the employer. However, where the employer is a labour hire company which had placed its employee with a third-party host employer at the time of the injury, the labour hire employer will often face challenges beyond those faced by other employers because it will not control the workplace where the worker was injured.⁵⁶
- 11.70. Section 109 of the WIRC Act imposes an obligation on a host employer in such a situation to do no more than 'cooperate with the labour hire employer, in respect of action taken by the labour hire employer in order to comply with sections 103, 104 and 105 to facilitate the worker's return to work' but only 'to the extent that it is reasonable to do so'. Although it attracts a penalty, this is essentially an unenforceable duty.
- 11.71. The Forsyth Inquiry into Labour Hire quoted research that found the return to work rates of labour hire workers were considerably lower than those of direct

54 Engage Victoria, Inquiry into the Victorian On-Demand Workforce (Webpage, 2021) <<https://engage.vic.gov.au/inquiry-on-demand-workforce>>.

55 See, eg, Submissions DP30 (HACSU), DP7 (AMIEU), DP54 (VTHC).

56 See generally Forsyth, A, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Report, 2016) 141-146 ('Forsyth Inquiry 2016').

employees.⁵⁷ Forsyth concluded both that ‘injury rates for labour hire workers are higher than for other Victorian workers’ and that ‘there is in some instances a lack of cooperation on the part of hosts with return-to-work arrangements for injured labour hire workers’.⁵⁸

- 11.72. However, Forsyth was not prepared to recommend any change to the existing law in light of concerns expressed to his review by WorkSafe that placing greater responsibilities on host employers ‘could have unintended consequences’.⁵⁹ Rather, the report considered that ‘best practice return to work arrangements should form part of the voluntary code of practice recommended (elsewhere in the report)’.⁶⁰
- 11.73. The Forsyth Report also recommended that the Victorian government collect data about the occupational health and safety of labour hire workers.⁶¹
- 11.74. This is another area that falls strictly outside my Terms of Reference and I have only heard limited evidence on the topic.
- 11.75. However, I am concerned about the position of labour hire workers in relation to return to work and consider there is a strong case for an amendment to section 109 of the WIRC Act to increase the obligations of the host employer for which the worker was working at the time of the injury. The host has a clear duty to protect the health and safety of the labour hire worker both at common law⁶² and under the *Occupational Health and Safety Act 2004 (Vic)*.⁶³
- 11.76. This is a matter that should be monitored carefully by WorkSafe and should be considered by the scheduled review of the scheme (see Recommendation 9).

57 Forsyth Inquiry 2016 (n 56) 145.

58 Forsyth Inquiry 2016 (n 56) 146.

59 Forsyth Inquiry 2016 (n 56) 145. The report does not record what those consequences might be. Forsyth also noted that the 2008 Hanks Review was not prepared to recommend any change to the law.

60 Forsyth Inquiry 2016 (n 56) 146; Recommendation 7.

61 Forsyth Inquiry 2016 (n 56) 146; Recommendation 7.

62 See, eg, *VWA v Carrier Air Conditioning Pty Ltd* [2006] VSCA 63 at [60]-[63].

63 *Occupational Health and Safety Act 2004 (Vic)* s 23. See generally Chris Maxwell, *Occupational Health and Safety Review* (Final Report, March 2004) 116-119 and William Breen Creighton and Peter Rozen, *Occupational Health and Safety Law in Victoria* (Federation Press, 4th ed, 2017) 97-98.

12. Implementation of recommendations

Key points

- A period of transition will be required for the recommendations in this report to be fully implemented.
- Under the proposed transition plan in this chapter, WorkSafe will assume responsibility for triaging all workers' compensation claims from 1 January 2023.
- Key to the success of the new arrangements will be a new oversight mechanism, including regular reporting to Parliament.

Purpose of the chapter

- 12.1. The purpose of this chapter is to outline the timelines and steps that will be required to implement the recommended changes to the management of complex workers' compensation claims in Victoria.
- 12.2. The chapter refers to key recommendations for the scheme, as outlined in this report.

Recommendations implementation timeline

- 12.3. The graphic below, Figure 12, includes a three-year transition timeline commencing on 1 July 2021 for the implementation of the recommendations in Chapter 10.
- 12.4. The graphic timeline is necessarily very high level, as is the description of the various phases that follows. This timeline is only intended to identify the necessary tasks that I consider need to be implemented and the sequence in which they should occur. WorkSafe and the WorkSafe Reform Implementation Monitor will need to carefully monitor any slippages because a slippage in one place may impact on the ability to carry out other tasks.
- 12.5. WorkSafe and the WorkSafe Reform Implementation Monitor should not consider the timeframes to be set in stone. They may need to be modified in light of the experience 'on the ground'. For example, WorkSafe may find recruiting

Improving the experience of injured workers

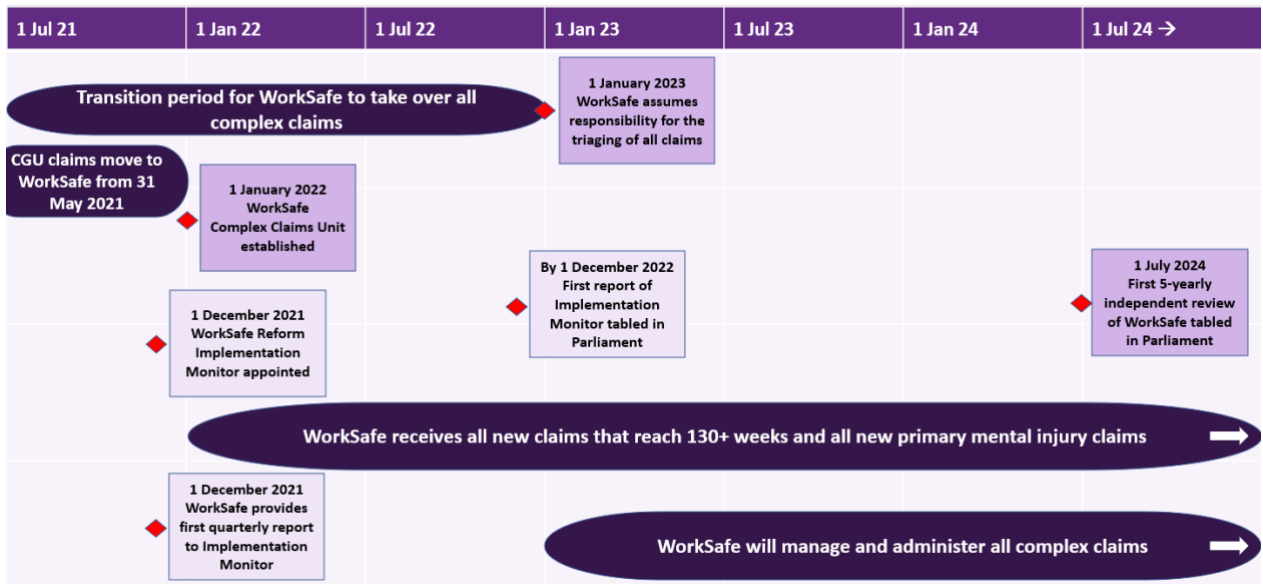
more difficult than expected. If that is the case, it would be preferable to modify the implementation timetable accordingly than to follow it regardless.

- 12.6. As the Victorian Bushfires Royal Commission Implementation Monitor, Mr Neil Comrie AO, APM observed, implementation of the recommendations of an inquiry is essentially a practical matter. It is more important to remain faithful to the policy intent and spirit of the recommendations than to slavishly implement them exactly as the inquirer intended. Reflecting in 2018 on his time as the Implementation Monitor for that crucial Royal Commission, Mr Comrie said:

With the development of better technology and further research, in a number of instances we actually found that there was a better way to do something than what the State had originally committed to. That's where I was able to exercise my judgment and say well, on the one hand, while the State has committed to do A, B is in fact the better way of achieving the outcome. So it was ... a dynamic environment where we weren't locked in..¹

- 12.7. The timeline will need to be the subject of an Implementation Plan which should be prepared by WorkSafe and approved by the Minister for Workplace Safety. It will be the implementation of this plan that the WorkSafe Reform Implementation Monitor oversees and reports upon.

Figure 12: High-level implementation timeline



¹ Neil Comrie, Implementation Monitor for the Victorian Bushfires Royal Commission, quoted in Alastair Stark, *Public Inquiries, Policy Learning, and the Threat of Future Crises* (Oxford Scholarship Online, October 2018) 115.

1 July 2021 - 31 December 2021

- 12.8. The new agent agreements will commence with the four remaining scheme agents. From their commencement, the agents will be working with WorkSafe to effect the transition to it of the management of complex claims.
- 12.9. Where necessary, WorkSafe will give the agents directions pursuant to section 501(2)(b) of the WIRC Act to identify what they need to do to be of the maximum assistance to WorkSafe in this regard.
- 12.10. An example of such a direction would be to require each of the agents to provide to WorkSafe a transition plan for the gradual transfer to WorkSafe of some complex claims. As a minimum, such a plan would address the matters identified in Schedule E of the current agency agreement.
- 12.11. During this period, WorkSafe will take over the management of current CGU claims for workers who have received 130 weeks or more of weekly payments and who are unlikely to return to their pre-injury employer. The approach will be person-centred and will take into account the individual biopsychosocial characteristics of each injured worker.
- 12.12. The twenty new staff members who have been engaged will commence that work and the policies, processes and structures supporting their work will be put in place.
- 12.13. The WorkSafe Reform Implementation Monitor will be appointed by 1 December 2021. The Implementation Plan will also be finalised by 1 September 2021.
- 12.14. Commencing on 1 December 2021, WorkSafe will provide the WorkSafe Reform Implementation Monitor with a quarterly report explaining how it is operationalising the Implementation Plan.
- 12.15. While this unit performs the day-to-day work of managing the former CGU claims, other WorkSafe staff members will be preparing for the work to be done during the second time block commencing on 1 January 2022. In particular, they will be ensuring that the experiences of the management of the former-CGU claims are being recorded to prepare for the new Complex Claims Unit that will become operational after 1 January 2022.

1 January 2022 - 30 June 2022

- 12.16. During this period, the Complex Claims Unit will be established. It will build on the experience of the unit that has been managing the former CGU claims.

Improving the experience of injured workers

12.17. The staffing requirements of the Complex Claims Unit will be dictated by the complex claims file load which will gradually increase as two categories of claims are transferred from the four agents to WorkSafe:

- New claims that reach 130 weeks' duration; and
- New primary mental injury claims.

1 July 2022 – 31 December 2022

12.18. WorkSafe will complete all necessary steps for technology capability to support the Complex Claims Unit. The Unit will be staffed to the level that reflects the file load as it gradually increases throughout 2022.

12.19. The *Claim for Compensation Ministerial Guidelines 2016* will have been amended and all employers and the agents will have been informed that claims will, with effect from 1 January 2023, be provided by employers to WorkSafe (Recommendation 3).

12.20. The WorkSafe Reform Implementation Monitor will have tabled their first annual report in Parliament by 1 December 2022.

12.21. WorkSafe will have finished negotiations with any parties that wish to be agents after 1 July 2023 for the purpose of managing non-complex claims.

1 January 2023 – 30 June 2023

12.22. WorkSafe will have implemented a triaging process for the purposes of identifying if a claim is complex or at risk of becoming complex with effect from 1 January 2023.

12.23. With the end of the transition period, WorkSafe will assume responsibility for the triaging of all claims. Under that process:

- All claims to be provided to WorkSafe by employers;
- WorkSafe will manage and administer all complex claims;
- WorkSafe will transfer all other claims to agents;
- Agents will manage those claims in accordance with WorkSafe's requirements which will include a process by which all claims are assessed periodically, and no later than at 13 weeks, for indications of complexity (e.g. the development of a secondary mental injury);
- Any such claim will be transferred back to WorkSafe for management in the Complex Claims Unit.

Improving the experience of injured workers

- 12.24. The staffing of the Complex Claims Unit will need to be appropriate to perform all of the tasks required of it and in light of the significant increases in the expected file load as all new complex claims are managed in-house.
- 12.25. The 2021-2023 agent contracts end. New contracts have been agreed with the agent(s) which will manage non-complex claims.

A WorkSafe Reform Implementation Monitor

- 12.26. The recommendations in this report call for a profound change to the way in which the Victorian workers' compensation system is administered and managed. Their implementation will constitute one of the most significant reforms to the Victorian workers' compensation scheme since 'WorkCare' in 1985.
- 12.27. The proposed changes are not without risk. The stakes are high especially for the injured workers whose claims will become the direct responsibility of WorkSafe. As noted in Chapter 5, WorkSafe was criticised by the Victorian Ombudsman in both her 2016 and 2019 reports.² The Ombudsman found that WorkSafe had failed to oversee the administration by its agents of complex claims. Yet WorkSafe will have a greater responsibility for complex claims under the new arrangements proposed by this Review.

Learning from other major reforms

- 12.28. In 2020, the Victorian government effected a 'once in a generation' reform of its fire services.³ The reforms commenced on 1 July 2020.
- 12.29. The responsible Minister was required to prepare an 'Implementation Plan' within 60 days of 1 July 2020.⁴ The plan was required to include 'priorities and processes' in relation to the implementation of the reforms including the 'financial stability' of the fire agencies.⁵ The Implementation Plan was published in October 2020.⁶
- 12.30. The *Fire Rescue Victoria Act 1958* (Vic) empowers the Governor in Council, on the advice of the Minister, to appoint a Fire Services Implementation Monitor on

² See Victorian Ombudsman, *Investigation into the Management of Complex Workers Compensation Claims and WorkSafe Oversight* (Report, September 2016); Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers' compensation claims* (Report, December 2019) ('Victorian Ombudsman 2019').

³ Government of Victoria, *Year One Fire Services Reform Implementation Plan* (Implementation Plan, October 2020) 5.

⁴ *Fire Rescue Victoria Act 1958* (Vic) s 130.

⁵ *Fire Rescue Victoria Act 1958* (Vic) s 130(2)(b).

⁶ Government of Victoria (n 3).

either a full or part time basis.⁷ A person is not eligible to be appointed to that role unless the Minister is satisfied that the person has:

- a) relevant senior executive management experience, particularly in an operational environment; and
- b) a strong understanding of complex multi-agency environments; and
- c) a significant record of providing evidence-based reports to Government.

12.31. The Fire Services Implementation Monitor, who was appointed in December 2020,⁸ is a key aspect of the fire services reforms.

12.32. The principal task of the Fire Services Implementation Monitor is to monitor and review the progress of the fire agencies in carrying out the Implementation Plan.⁹ The Fire Services Implementation Monitor may also prepare a report on her or his operations at any other time and any such reports must be tabled in Parliament.¹⁰ The fire agencies are required to cooperate with the Fire Services Implementation Monitor in the exercise of the Monitor's functions.¹¹

12.33. The Fire Services Implementation Monitor:

- is 'not subject to the direction or control of the Minister';
- has 'complete discretion' in respect of the performance of their functions and duties;¹²
- may 'engage in activities with, require demonstrations of systems by, or obtain documents from, an agency, to produce an accurate assessment of how an implementation action is being carried out or has been carried out';¹³
- is required to advise the Minister at the earliest opportunity about any concern the Monitor has about the carrying out of an implementation action;
- may make recommendations to the Minister in relation to the carrying out of an implementation action by an agency;¹⁴ and

⁷ *Fire Rescue Victoria Act 1958* (Vic) s 123.

⁸ Premier of Victoria, 'Fire Services Implementation Monitor Appointed' (Press Release, 16 December 2020).

⁹ *Fire Rescue Victoria Act 1958* (Vic) s 131(1)(a).

¹⁰ *Fire Rescue Victoria Act 1958* (Vic) s 142.

¹¹ *Fire Rescue Victoria Act 1958* (Vic) s 136.

¹² *Fire Rescue Victoria Act 1958* (Vic) s 129.

¹³ *Fire Rescue Victoria Act 1958* (Vic) s 133(b).

¹⁴ *Fire Rescue Victoria Act 1958* (Vic) s 133(e)

Improving the experience of injured workers

- is required to consult with the fire agencies in the performance of their functions and to prepare an annual report on the findings of the Monitor in relation to the performance of their functions.¹⁵

12.34. Other examples of independent monitors who are overseeing the implementation of recommendations of Royal Commissions and major inquiries include:

- the Inspector-General of Emergency Management who is reporting annually on the implementation of the recommendations of the two Hazelwood Mine Fire Inquiries;¹⁶
- the Inspector-General of Emergency Management who is reporting annually on the implementation of the Parliament of Victoria's Inquiry into the Country Fire Authority Training College at Fiskville;¹⁷
- the Inspector-General of Emergency Management who took over the reporting role of the independent implementation monitor in relation to the recommendations of the Victorian Bushfires Royal Commission.¹⁸

12.35. The Royal Commission into Institutional Responses to Child Sexual Abuse observed in its final report that 'Royal Commission reports are not self-executing documents'.¹⁹ The same may be said for inquiry reports such as this one. Independent implementation monitoring 'provides assurance to community members and the Victorian government' that the lessons identified and the recommendations for reform made are 'acted upon in a timely and sustainable manner'.²⁰ Implementation is the primary measure of the effectiveness of a public inquiry.²¹

15 *Fire Rescue Victoria Act 1958* (Vic) s 131(1)(c)-(e).

16 Bernard Teague, John Catford and Sonia Petering, *Hazelwood Mine Fire Inquiry* (Final report, 2014) 49 and Recommendation 1; Bernard Teague, John Catford and Anita Roper, *Hazelwood Mine Fire Inquiry* (Final Report, 2015-16) vol II, 91, Recommendation 1; Inspector General of Emergency Management, *Hazelwood Mine Fire Inquiry: Implementation of Recommendations and Affirmations* (Fifth progress report, 2020).

17 Inspector General of Emergency Management, *Implementation of Government Commitments in Response to the Inquiry into the CFA Training College at Fiskville* (Third Progress Report, 2020).

18 *Victorian Bushfires Royal Commission* (Final Report Summary, 2010) 20-21, 37, Recommendation 66; *Bushfires Royal Commission Implementation Monitor Act 2011* (Vic). See generally, Starke A, *Public Inquiries, Policy Learning and the Threat of Future Crises* (Book, 2018) 122-123.

19 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, 2017) vol 17, 51. See generally *Royal Commission into Aged Care Quality and Safety* (Final Report, March 2021) vol 3B, ch 26.

20 Inspector General of Emergency Management, *Hazelwood Mine Fire Inquiry: Implementation of Recommendations and Affirmations* (Fifth progress report, 2020) 43.

21 Australian Law Reform Commission, *Making Inquiries Report – A New Statutory Framework* (Report, 2009) 165.

- 12.36. I consider that a Monitor would be a critical element to ensuring that the Review's recommendations are implemented effectively. I recommend the appointment of a WorkSafe Reform Implementation Monitor (Recommendation 22) to perform this vital role. The Monitor should have relevant senior executive management experience and experience of providing evidence-based reports to Government.
- 12.37. The Monitor will inquire into and report annually on the government and WorkSafe's progress in implementing the recommendations. While one important source of information will be the quarterly reports the Monitor receives from WorkSafe, it is important that the Monitor consults widely to test what WorkSafe is reporting. I anticipate that the Monitor will consult with employers, unions, injured worker support organisations, health professionals and others as the Monitor determines is appropriate.

Recommendation 21: WorkSafe reform implementation plan and quarterly reports

By 1 September 2021, WorkSafe should develop and make publicly available a detailed implementation plan which outlines how and when the recommendations of this Review will be implemented. The implementation plan should be approved by the Minister for Workplace Safety.

Commencing on 1 December 2021, WorkSafe should provide the WorkSafe Reform Implementation Monitor with a quarterly report outlining what it has done in that quarter to implement the recommendations in accordance with the implementation plan.

Recommendation 22: WorkSafe Reform Implementation Monitor

The *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) should be amended to empower the Governor in Council to appoint a WorkSafe Reform Implementation Monitor on either a full or part time basis.

A WorkSafe Reform Implementation Monitor should be appointed by no later than 1 December 2021 for a term of three years.

To be eligible for appointment as the WorkSafe Reform Implementation Monitor, a person should have relevant senior executive management experience and experience of providing evidence-based reports to Government.

Improving the experience of injured workers

The WorkSafe Reform Implementation Monitor should not be subject to direction or control of the Minister. Their powers should be based on those of the Fire Services Implementation Monitor appointed under section 123 of the *Fire Rescue Victoria Act 1958* (Vic).

The principal task of the WorkSafe Reform Implementation Monitor will be to inquire into and report annually to parliament on the government's and WorkSafe's progress in implementing the recommendations of this Review.

Table 11: Indicative WorkSafe reform implementation timeline

Date	Milestone	Recommendation
31 May 2021	WorkSafe assumes responsibility for claims previously managed by CGU	
The current schedule of claims WorkSafe will take on from CGU is 539.		
1 July 2021	Transition period for WorkSafe taking over all complex claims commences	
1 September 2021	Publication of WorkSafe's implementation plan for this Review's recommendations, as approved by the Minister for Workplace Safety	21
1 December 2021	WorkSafe Reform Implementation Monitor appointed and role operational	22
	WorkSafe to provide first quarterly report to the WorkSafe Reform Implementation Monitor	21
1 January 2022	WorkSafe to establish a Complex Claims Unit	7
	WorkSafe receives new claims that reach 130 weeks' duration and new primary mental injury claims	
1 December 2022	First report of WorkSafe Reform Implementation Monitor is tabled in Parliament	22
On the basis of the numbers provided by WorkSafe in Table 12 below, the total number of claims that WorkSafe estimates it would receive between 1 January 2022 – 31 December 2022 is 10, 350.		

Improving the experience of injured workers

Date	Milestone	Recommendation
1 January 2023	<p>Transition period completed</p> <p>All claims to be provided to WorkSafe by employers</p> <p>WorkSafe's triage process for identifying complex claims (and claims at risk of becoming complex) established and implemented, including technology and workforce capability.</p> <p>After initial triage, WorkSafe to transfer all non-complex claims to agents</p>	3, 4, 8, 5
30 June 2023	Current agent contracts end	
31 August 2023 and ongoing	Agent to assess claims every 13 weeks for complexity or at risk of becoming complex	6
<p>WorkSafe provided information to the Review which assumes that approx. 20% of new claims are complex claims. On this basis, WorkSafe has further calculated that if it was to directly manage complex claims, it would receive an estimated 5,500 new complex claims between 1 January 2023 and 31 December 2023.</p>		
1 July 2024	First statutory independent review of WorkSafe is tabled in Parliament	9

Table 12: WorkSafe estimates of claim numbers by stage of implementation.²²

Group	Description	Approximate Annual Volume (calendar 2022)
130+week weekly benefit claims	Injured Workers who have a claim which has just passed 130 weeks since the claim was received, are in receipt of weekly benefits and have been assessed as having 'No Capacity Indefinitely' and are to continue to receive weekly benefits.	1,500
130+week medical benefits	Claims for workers who are not in receipt of weekly benefits but are in receipt of medical and like benefits more than 130W after injury and	4,850

²² Email from [REDACTED] to Kirsten McKillop, Director Independent Agent Review, 27 April 2021.

Improving the experience of injured workers

	claim lodgement. This definition includes a group of Injured Workers (~1300) still receiving weekly benefits but are expected to cease in the short-term.	
New Primary Mental Injury Claims – Weekly Benefits	All new standard claims which are accepted (or subsequently accepted following dispute resolution), but only where there is a weekly benefit	2,500
New Primary Mental Injury Claims – Medical Expense Only	As above, but medical expense only	1,500

Appendix A – Stakeholder consultation list

Number	Name	Attendees	Date
1.	Roundtable with medical and rehabilitation provider peak bodies	Australian Medical Association (AMAV), Royal Australian College of General Practitioners (RACGP), Australian Rehabilitation Providers Association (ARPA).	20.08.2020
2.	Roundtable with WorkSafe agents	Allianz Australia Ltd, CGU, Employers Mutual Limited, Gallagher Bassett (GB), Xchanging	20.08.2020
3.	Victorian Trades Hall Council (VTHC)	VTHC	21.08.2020
4.	Roundtable with emergency services unions	United Firefighters Union Victoria (UFU), Victorian Ambulance Union (VAU), The Police Association of Victoria (TPAV)	21.08.2020
5.	Medical Panels (MP) and Accident Compensation Conciliation Service (ACCS)	Medical Panels, ACCS	25.08.2020
6.	Roundtable with employer groups	Australian Industry Group (Ai Group), Housing Industry Association (HIA), Master Builders Association Victoria (MBV), Self-Insurers Association Victoria (SIAV), Victorian Farmers Federation (VFF), Victorian Chamber of Commerce and Industry (VCCI)	26.08.2020
7.	Roundtable with legal services peak body and provider groups	Law Institute of Victoria (LIV), Australian Lawyers Alliance (ALA), Common Law Bar Association (CLBA), Compensation Law Bar Association	26.08.2020
8.	Roundtable with union group 1	Australian Education Union (AEU), Community and Public Sector Union (CPSU), Finance Sector Union (FSU), Independent Education Union of Australia (IEUA), National Tertiary Education Union of Australia (NTEU)	27.08.2020
9.	Roundtable with union group 2	Electrical Trades Union (ETU), Maritime Union of Australia (MUA), Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)	27.08.2020
10.	Roundtable with union group 3	Health and Community Services Union (HACSU), Australian Nursing and Midwifery Federation (ANMF), United Workers Union (UWU), Australian Services Union (ASU), Rail, Tram and Bus Union (RTBU), Shop, Distributive and Allied Employees Association (SDA), Australasian Meat Industry Employees Union (AMIEU),	02.09.2020

Improving the experience of injured workers

Number	Name	Attendees	Date
		Australian Manufacturing Workers Union (AMWU)	
11.	Australian Workers Union (AWU)	AWU	04.09.2020
12.	Victorian Ombudsman	Victorian Ombudsman	14.09.2020
13	Transport Accident Commission (TAC session 1)	Transport Accident Commission (TAC)	17.09.2020
14.	WorkSafe's Legal Panel and Adviceline Injury Lawyers	Hall & Willcox, IDP Lawyers, Lander & Rogers, Minter Ellison, Russell Kennedy Lawyers, Thomson Geer Lawyers, Wisewould Mahony, Adviceline Injury Lawyers	18.09.2020
15.	National Disability Insurance Agency (NDIA)	NDIA	22.09.2020
16.	Office of Industrial Relations (OIR) and WorkCover Queensland	OIR and WorkCover Queensland	23.09.2020
17.	Roundtable with expert panel (Expert session 1)	Prof. Alex Collie, Prof. Michael Nicholas, Dr. Michael Sullivan, Ms. Samantha Barker, Mr. Alan Clayton, Ms. Janet Dore, Dr. Robyn Horsley, Ms. Rosemary McKenzie-Ferguson	23.09.2020
18.	WorkSafe Victoria session 1	WorkSafe Victoria	01.10.2020
19.	Roundtable with expert panel (Expert session 2)	Prof. Alex Collie, Prof. Michael Nicholas, Dr. Mary Wyatt, Dr. Michael Sullivan, Prof. Ian Cameron, Ms. Samantha Barker, Mr. Alan Clayton, Ms. Janet Dore, Ms. Rosemary McKenzie-Ferguson	08.10.2020
20.	Online discussion with injured workers convened in collaboration with the Injured Workers Peer Support Network (Injured workers' online discussion 1)	One representative from the Injured Workers Peer Support (IWPSN) and five injured workers	5.10.2020
21.	Online discussion with injured workers convened in collaboration with the UFU, AMIEU and CPSU (Injured workers' online discussion 2)	UFU – One representative and two injured members, CPSU – One representative and two injured members, AMIEU – One representative and One injured member.	13.10.2020
22.	WorkSafe Victoria session 2	Representatives from WorkSafe's Recovery Model Office program with Gallagher Bassett	25.11.2020
23.	State of Washington Department - Department of Labor and Industries (Dept L&I, Washington)	Dept L&I, Washington, USA	27.01.2021
24.	WorkSafe British Columbia (WorkSafeBC)	WorkSafeBC, Canada	29.01.2021
25.	Accident Compensation Corporation, New Zealand (ACC NZ)	ACC NZ	05.02.2021

Improving the experience of injured workers

Number	Name	Attendees	Date
26.	Individual worker telephone call 1	Injured worker 1, name withheld	25.02.2021
27.	Individual worker telephone call 2	Partner of injured worker 2, name withheld	26.02.2021
28.	Individual worker telephone call 3	Individual injured worker 3, name withheld	01.03.2021
29.	Individual worker telephone call 4	Individual injured worker 4, name withheld	02.03.2021
30.	Individual worker telephone call 5	Individual injured worker 5, name withheld	02.03.2021
31.	Individual worker telephone call 6	Individual injured worker 6, name withheld	03.03.2021
32.	WorkSafe Victoria session 3	WorkSafe Victoria	04.03.2021
33.	Individual worker telephone call 7	Individual injured worker 7, name withheld	04.03.2021
34.	Individual worker telephone call 8	Individual injured worker 8, name withheld	04.03.2021
35.	Individual worker telephone call 9	Individual injured worker 9, name withheld	05.03.2021
36.	Individual worker telephone call 10	Individual injured worker 10, name withheld	05.03.2021
37.	Individual worker telephone call 11	Individual injured worker 11, name withheld, and support person	10.03.2021
38.	Transport Accident Commission (TAC session 2)	TAC representatives from the Complex Recovery and Serious Injury Division	11.03.2021
39.	Individual worker telephone call 12	Individual injured worker 12, name withheld, and one representative from Slater and Gordon Lawyers	12.03.2021
40.	Individual worker telephone call 13	Individual injured worker 13, partner, and one representative from Slater and Gordon Lawyers	12.03.2021
41.	Individual worker telephone call 14	Individual injured worker 14, name withheld, partner and one representative from Slater and Gordon Lawyers	12.03.2021
42.	Individual worker telephone call 15	Individual injured worker 15, name withheld, and one representative from Slater and Gordon Lawyers	12.03.2021
43.	Individual worker telephone call 16	Individual worker 16, name withheld	26.03.2021
44.	WorkSafe Victoria session 4	WorkSafe Victoria	29.3.2021

Appendix B – Expert panel members

Number	Name	Biography
1	Mr. Alan Clayton	<p>Mr Clayton has had a long experience with the Victorian workers' compensation scheme, even prior to the seminal 1985 changes. This has been in government, with the Victorian WorkCover Authority and as a consultant and adjunct academic.</p> <p>Mr Clayton is currently Principal of Bracton Consulting Services Pty Ltd. As a consultant, Mr Clayton has conducted reviews of, or major aspects of, eight of Australia's eleven major workers' compensation systems as well as the dust diseases regime in New South Wales.</p> <p>Mr Clayton's experience extends to significant involvement with many overseas schemes including assisting the BPJS Ketenagakerjaan, the Indonesian work social insurance regulator, in developing a return-to-work focused workers' compensation system for Indonesia. Most recently, he has been advising the Government of the Cook Islands on a new workers' compensation scheme for that small country.</p> <p>Mr Clayton was the inaugural Australasian representative for the International Disability Standards Management Council, the leading international body in the area of programme standards and professional certification in disability management. He has presented more than seventy papers at conferences in Australia, New Zealand, the United States, France, Germany, Sweden, Denmark, Indonesia and the Philippines on workers' compensation, rehabilitation and occupational health and safety issues and has taught at a tertiary level in both Australia and the United States.</p>
2	Professor Alex Collie PhD	<p>Professor Collie is currently Professor and Director of the Healthy Working Lives Research Group in the School of Public Health and Preventive Medicine at Monash University where he leads research with major focus on Australian workers' compensation schemes.</p> <p>From 2009 to 2017, Professor Collie was Chief Research Officer and then Chief Executive Officer at the Institute for Safety Compensation and Recovery Research, a research partnership between Monash University, WorkSafe Victoria and the Transport Accident Commission (TAC). Prior to that, Professor Collie was a senior manager responsible for the health research program within the joint health services division of WorkSafe Victoria and the TAC.</p> <p>Professor Collie's research interests include the determinants of health and return to work among injured and ill workers, interventions related to return to work, injured workers' experiences of compensation claims processes, the interactions between injury compensation and healthcare systems, and evaluating the impact of policy change on injured workers and workers' compensation schemes.</p>
3	Ms. Janet Dore	<p>Ms Dore is a public advocate for safety, wellbeing and economic development to benefit communities. Ms Dore has a strong background in implementing operational models for achieving outcomes in personal injury schemes.</p> <p>In February 2019, the New South Wales State Insurance Regulatory Authority appointed Ms Dore to the role of Independent Reviewer in a review it commissioned on the Nominal Insurer of the New South</p>

Improving the experience of injured workers

Number	Name	Biography
		<p>Wales workers' compensation scheme. Ms Dore released her report in December 2019.</p> <p>Ms Dore was the Interim CEO of City of Ballarat in 2020 and is a Fellow of both the Australian Institute of Management and the Australian Institute of Company Directors. Ms Dore has also held positions as:</p> <ul style="list-style-type: none"> • a member of the committee of the New South Wales Government's State Insurance Regulatory Authority's Compulsory Third Party (CTP) Premium Committee; • CEO of TAC 2008 – 2015; • General Manager of City of Newcastle, New South Wales; • CEO of City of Ballarat (1990s); and • Board Director, having served on the boards of the Municipal Association of Victoria's self-insured workers' compensation scheme, NIB Health Funds, Newcastle Airport, and the Institute for Safety Compensation and Recovery Research.
4	Professor Michael Nicholas PhD	<p>Professor Nicholas is a clinical psychologist specialising in pain management. He is also a distinguished member of the Australian Pain Society and a highly respected researcher and leader in developing the biopsychosocial field of research.</p> <p>Professor Nicholas's current position is Director, Pain Education & Pain Management Programs, University of Sydney, Pain Management Research Institute, Faculty of Medicine and Health.</p> <p>Having an outstanding record of achievement in multidisciplinary pain management, pain education and psychosocial pain research, Professor Nicholas has published many studies on chronic pain and reducing disability in injured workers.</p> <p>Professor Nicholas is recognised as an international leader in the investigation of psychosocial contributors to persisting pain and predictors of pain outcomes.</p> <p>Professor Nicholas is the lead author on New South Wales's Work Injury Screening and Early Intervention' program (WISE) program. He also developed the Pain Self-Efficacy and the Orebro Musculoskeletal Pain Screening questionnaires, both which are widely used in clinical practice around the world.</p>
5	Professor Michael Sullivan PhD	<p>Professor Sullivan is the Canada Research Chair in Behavioural Health, Department of Psychology, McGill University, Montreal, Quebec.</p> <p>Professor Sullivan holds cross-appointments with the School of Physical and Occupational Therapy and is Scientific Director of the Centre for Research on Pain, Disability and Social Integration.</p> <p>Professor Sullivan has lectured nationally and internationally on the social and behavioural determinants of pain-related disability and is best known for his research on psychosocial risk factors for pain-related disability, and for the development of risk-targeted</p>

Improving the experience of injured workers

Number	Name	Biography
		<p>interventions designed to foster occupational re-engagement following injury.</p> <p>Professor Sullivan’s research forms the basis of the Progressive Goal Attainment Program, an evidence-based intervention for targeting psychosocial risk factors for prolonged disability, and a number of assessment tools including the Pain Catastrophising Scale (PCS) and the Injustice Experiences questionnaire. The PCS has been used in more than 900 scientific studies and is currently the most widely used measure of catastrophic thinking related to pain.</p> <p>In the past five years Professor Sullivan has also worked at University of Queensland, as Honorary Professor and Director of the Recover Injury Research Centre. He has served as a consultant to numerous health and safety organisations, insurance groups, departments of National Defence/Veterans Affairs, as well as social policy and research institutes.</p>
6	Dr. Robyn Horsley OAM	<p>Dr Horsley has been a consultant occupational physician for more than thirty years and has worked as a rehabilitation provider, an onsite occupational physician, and as a medicolegal practitioner, doing both independent medical examiner work and plaintiff lawyer referrals.</p> <p>Dr Horsley has worked across the various Victorian workers’ compensation systems, including WorkCover and WorkSafe. For ten years, Dr Horsley was a member of the Department of Veterans Affairs National Technical Advisory Committee, a committee set up to implement the most recent legislation affecting veterans and to advise on best practice return to work evidence</p> <p>Three years ago, Dr Horsley was appointed to the WorkCover Advisory Committee (WAC) and continues to be a member of the WAC.</p> <p>Dr Horsley is the founding director and principal of HDA Medical Group, a multi- disciplinary consultancy practice with a focus on return to work management.</p>
7	Ms. Rosemary McKenzie-Ferguson	<p>Ms McKenzie-Ferguson is the founder of ‘Craig’s Table’, a peer-run social enterprise providing injured workers in New South Wales with social connection and the opportunity to gain transferable skills within their capacity in a supportive community environment.</p> <p>Craig’s Table first operated in South Australia and subsequently received seed-funding from icare to establish operations in New South Wales.</p> <p>Ms McKenzie-Ferguson is also the founder of Injured Worker Well-Being Week and is recognised as a leader in the field of supporting people who suffer workplace injuries and the families of those who lose loved ones in workplace accidents. Ms McKenzie-Ferguson’s first exposure to workplace tragedy was in 1969, when her 16yo brother died in a workplace accident. Ms McKenzie-Ferguson was subsequently injured at work herself in 1994, inspiring her to improve social justice in the workers’ compensation system for injured workers, their families and the wider community.</p>
8	Ms. Samantha Barker	<p>Ms Barker was a founding staff member of the Institute of Safety, Compensation and Recovery Research (ISCRR), established as a partnership between Monash University, WorkSafe Victoria and the</p>

Number	Name	Biography
		<p>Transport Accident Commission (TAC) in 2009 to facilitate research and best practice in the areas of injury prevention, rehabilitation and compensation.</p> <p>Ms Barker was appointed Director of ISCRR in 2019, and oversees its operations and leads the implementation of ISCRR's research plan and strategic activities. She is focused on driving best practice in applied research across the areas of prevention, injury recovery and system design. She has a particular interest in the primary prevention of mental health illness and interventions for supporting long-term injured workers.</p> <p>She also sits on the Evaluation Committee for Road Trauma Support Services Victoria.</p> <p>Prior to her role at ISCRR, Ms Barker worked in a number of roles in claim services and research at the TAC, and during this time she also completed her Honours in Psychology.</p>
9	Dr. Mary Wyatt	<p>Dr Wyatt is an occupational physician with over thirty years' experience in workers' compensation in Victoria and other jurisdictions.</p> <p>Prior to specialising as an occupational physician, Dr Wyatt was a general practitioner.</p> <p>Dr Wyatt's work as an occupational physician has included roles as a treating specialist and independent medical examiner in Victoria and in other jurisdictions.</p> <p>Dr Wyatt's work within the workers' compensation field has included:</p> <ul style="list-style-type: none"> • Managing a small enterprise that provided case management of work injuries for medium to large employers. • Recurrent work across different work injury schemes over the last ten years in Western Australia, South Australia, Victoria, Northern Territory and more recently New South Wales. • Research in the field of spinal problems and in the field of return to work. • 'Retailing' scientific evidence on return to work through RTWMatters.org, a web resource which aims to provide good quality practical information to those who work in the field. • Work as a conciliator in the then newly formed Accident Compensation Conciliation Service. • A review of the Queensland scheme, focused on return to work, for the regulator. • Policy development through the Australasian Faculty of Occupational and Environmental Medicine (AFOEM), part of the Royal Australasian College of Physicians (RACP). This includes being the lead Fellow on the AFOEM Policy and Advocacy Committee developing policy on evidence-based work injury scheme design.

Improving the experience of injured workers

Number	Name	Biography
		<ul style="list-style-type: none"><li data-bbox="762 286 1353 315">• Advisory work for government insurers and regulators.
10	Professor Ian Cameron	<p data-bbox="663 365 1358 450">Professor Cameron is a consultant physician in rehabilitation medicine and has the Chair in Rehabilitation Medicine, Sydney Medical School, at the University of Sydney.</p> <p data-bbox="663 483 1358 595">Professor Cameron is also a clinician researcher, whose research includes injury related disability and rehabilitation medicine. Professor Cameron has provided advice to Australian and State Government bodies.</p>

Appendix C – Submissions to discussion paper

Submission Number	Submission Name / Stakeholder	Date of Submission
DP1.	Accident Compensation Conciliation Service (ACCS)	28.09.2020
DP2.	Aegis Risk Management Services Pty. Ltd (Aegis)	21.09.2020
DP3.	Alan Clayton	09.10.2020
DP4.	Australian Nursing and Midwifery Federation (ANMF)	21.09.2020
DP5.	Appropriate Measures Pty Ltd trading as People Change Consulting (Appropriate Measures)	21.09.2020
DP6.	Australasian Faculty of Occupational and Environmental Medicine, Royal Australasian College of Physicians in consultation with the Australasian Faculty of Rehabilitation Medicine and the Victorian Regional Committee (RACP)	02.10.2020
DP7.	Australasian Meat Industry Employees Union (AMIEU)	24.09.2020
DP8.	Australian Centre for Justice Innovation, Monash University (ACJI Monash)	28.09.2020
DP9.	Australian Education Union (AEU)	24.09.2020
DP10.	Australian Industry Group (Ai Group)	22.09.2020
DP11.	Australian Lawyers Alliance (ALA)	18.09.2020
DP12.	Australian Manufacturing Workers Union (AMWU)	28.09.2020
DP13.	Australian Meat Industry Council (AMIC)	18.09.2020
DP14.	Australian Psychological Society (APS)	28.09.2020
DP15.	Australian Rehabilitation Providers Association (ARPA)	21.09.2020
DP16.	Australian Services Union (ASU)	21.09.2020
DP17.	██████████	20.09.2020
DP18.	Community and Public Sector Union Victoria (CPSU)	21.09.2020
DP19.	Compensation Law Bar Association and Common Law Bar Association (Bar Associations)	28.09.2020
DP20.	Construction Forestry Mining and Energy Union – Construction & General Branch, Victoria/Tasmania (CFMEU)	01.10.2020
DP21.	Counselling Appraisal Consultants Pty Ltd (CAC)	07.09.2020

Improving the experience of injured workers

Submission Number	Submission Name / Stakeholder	Date of Submission
DP22.	Craig's Table	27.09.2020
DP23.	Dr. Mary Wyatt	28.09.2020
DP24.	Dr. Mary Wyatt, Prof. Michael Nicholas, Dr. Pam Garton, Dr. Ross Iles (Wyatt et al)	28.09.2020
DP25.	Dr. Robyn Horsley	17.09.2020
DP26.	██████████	20.09.2020
DP27.	Gallagher Bassett Services Workers Compensation Vic Pty Ltd (Gallagher Bassett)	21.09.2020
DP28.	████████████████████	24.08.2020
DP29.	██████████	21.09.2020
DP30.	Health and Community Services Union (HACSU)	21.09.2020
DP31.	██████████	24.09.2020
DP32.	Independent Education Union (IEU)	21.09.2020
DP33.	Individual submission 1, name withheld	20.09.2020
DP34.	Individual submission 2, name withheld	21.09.2020
DP35.	Injured Workers Support Network (IWSN)	21.09.2020
DP36.	Insurance Work and Health Group, Monash University (IWHG Monash)	21.09.2020
DP37.	Jane Greacen OAM	28.09.2020
DP38.	John McNamara	21.09.2020
DP39.	Law Institute of Victoria (LIV)	29.09.2020
DP40.	██████████	17.09.2020
DP41.	Master Builders Victoria (MBV)	17.09.2020
DP42.	Occupational rehabilitation provider, name withheld	21.09.2020
DP43.	Royal Australian College of General Practitioners Ltd (RACGP)	21.09.2020
DP44.	Shop Distributive and Allied Employees' Association (SDA)	22.09.2020
DP45.	Slater and Gordon Lawyers	21.09.2020
DP46.	Suncorp	21.09.2020
DP47.	Technology provider, name withheld	21.09.2020
DP48.	The Police Association of Victoria (TPAV)	21.09.2020

Improving the experience of injured workers

Submission Number	Submission Name / Stakeholder	Date of Submission
DP49.	United Firefighters' Union (UFU)	22.09.2020
DP50.	United Workers Union (UWU)	21.09.2020
DP51.	Uniting Victoria and Tasmania (Uniting Victoria)	21.09.2020
DP52.	Victorian Ambulance Union (VAU)	21.09.2020
DP53.	Victorian Farmers Federation (VFF)	21.09.2020
DP54.	Victorian Trades Hall Council (VTHC)	21.09.2020
DP55.	WorkSafe agent, name withheld	21.09.2020
DP56.	WorkSafe legal service provider, name withheld	24.09.2020
DP57.	WorkSafe Victoria (WorkSafe)	22.09.2020
DP58.	Xchanging Integrated Services Victoria Pty Ltd trading as Xchanging (Xchanging)	21.09.2020
DP59.	WorkSafe agent, name withheld	21.09.2020
DP60.	██████████	27.11.2020
DP61.	██████████	18.01.2021
DP62.	Exercise & Sports Science Australia (ESSA)	29.01.2021

Appendix D – Submissions to options paper

Submission Number	Submission Name / Stakeholder	Date of Submission
OP1.	Australian Industry Group (Ai Group)	31.01.2021
OP2.	Australian Lawyers Alliance (ALA)	29.01.2021
OP3.	Australian Medical Association Victoria (AMAV)	03.02.2021
OP4.	Australian Rehabilitation Providers Association (ARPA)	29.01.2021
OP5.	Construction, Forestry, Maritime, Mining and Energy Union (CFMEU)	29.01.2021
OP6.	Craig's Table	8.01.2021
OP7.	Ms Samantha Barker Professor Ian Cameron Mr Alan Clayton Professor Alex Collie Ms Janet Dore Dr Pam Garton Dr Robyn Horsley OAM Dr Ross Iles Professor Michael Nicholas Dr Michael Sullivan Dr Mary Wyatt (Expert academic and medical professional group)	29.01.2021
OP8.	Gallagher Bassett Services Workers Compensation Vic Pty Ltd (Gallagher Bassett)	29.01.2021
OP9.	Occupational rehabilitation provider, name withheld	29.01.2021
OP10.	Royal Australian and New Zealand College of Psychiatrists (RANZCP)	29.01.2021
OP11.	Slater and Gordon Lawyers	29.01.2021
OP12.	Victorian Automobile Chamber of Commerce (VACC)	29.01.2021
OP13.	Victorian Farmers Federation (VFF)	29.01.2021
OP14.	Victorian Trades Hall Council (VTHC)	29.01.2021
OP15.	WorkSafe agent, name withheld	29.01.2021
OP16.	WorkSafe agent, name withheld	29.01.2021
OP17.	Xchanging Integrated Services Victoria Pty Ltd (Xchanging)	29.01.2021

Appendix E – Jurisdictional comparison of compensation schemes

Jurisdiction ^{1326F1}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
Victorian State compensation schemes							
Victoria	Publicly underwritten and regulated by a statutory body Outsourced claims management	WorkSafe Victoria (Victorian WorkCover Authority)	WorkSafe Victoria Self-insurers (40)	WorkSafe delegates claims management to 5 private sector scheme agents (Allianz, CGU, EML GBS, & Xchanging) Catastrophic claim medical management is delegated to the TAC Self-insurers ^{1327F2}	2,967,417 (workers under the scheme) ~223,000 (self-insurer workers, 7% by remuneration)	<i>Workplace Injury Rehabilitation and Compensation Act 2013</i> (Vic)	WorkSafe Victoria Accident Compensation Conciliation Service (ACCS) Medical Panels Magistrates' or County Court

¹ Australian and New Zealand information is largely derived from: Safe Work Australia, *Comparison of Workers' Compensation Arrangements in Australia and New Zealand (2019)* (Report, 2020) 19-20, 188 ('Safe Work 2019').

² Self-insurers may manage claims in-house or delegate to claims administrators, however as the licensee, the insurer is typically responsible for meeting the regulator's contractual requirements and legislative compliance.

Improving the experience of injured workers

Jurisdiction ^{1326F¹}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
Victorian Transport Accident Insurance	Publicly underwritten, managed and regulated by a statutory body Insourced claims management	Transport Accident Commission (TAC)	TAC	TAC (may intermittently delegate some claims management functions to private sector claim administrators)	59,298 road accident claimants ^{1328F³}	<i>Transport Accident Act 1986</i> (Vic)	TAC Victorian Civil and Administrative Tribunal (VCAT) County Court
Australian State and Territory workers' compensation schemes							
Australian Capital Territory	Privately underwritten and managed by authorised insurers Regulated by a statutory body	WorkSafe ACT	Approved private sector insurers (7) Self-insurers (8) Australian Capital Territory Insurance Authority (ACTIA)	Approved insurers (Allianz, Catholic Church Insurances, CGU, GIO, Guild Insurance, QBE, Zurich Financial Services) Self-insurers ACTIA	147,400 (non-gov workers) ~3,174 (self-insurer workers)	<i>Workers Compensation Act 1951</i> (ACT)	Conciliation Arbitration Magistrates Court Supreme Court
New South Wales	Publicly underwritten by statutory body	State Insurance Regulatory Authority (SIRA)	'Nominal Insurer' icare Workers Insurance	icare delegates claim management to four private sector scheme	3,611,821 (workers under the scheme) ~812,860 (self-insurer workers)	<i>Workplace Injury Management and Workers Compensation Act 1998</i> (NSW)	SIRA Workers Compensation Commission

³ Transport Accident Commission, *Annual Report 2019-20*, (Report, 2020) 6.

Improving the experience of injured workers

Jurisdiction ^{1326F}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
	<p>Outsourced claims management</p> <p>Regulated by statutory body</p>		<p>Self-insurers (non-govt employers, 66)</p> <p>Self-Insurance Corporation administers the Treasury Managed Fund⁴</p> <p>Specialised insurers (6 industry group insurers)</p>	<p>agents (Allianz, EML, GIO and QBE)</p> <p>Self-insurers</p> <p>Self-Insurance Corporation delegates claims management to three private sector scheme agents (Allianz, EML & QBE)</p> <p>Specialised industry insurers (Catholic Church Insurances, Coal mines insurance, Guild Insurance, HEM, Racing NSW, StateCover Mutual)</p>		<p><i>Workers Compensation Act 1987</i> (NSW)</p>	<p>Workers Compensation Independent Review Office (WIRO)</p>
Northern Territory	<p>Privately underwritten and managed by authorised insurers</p> <p>Regulated by a statutory body</p>	<p>NT WorkSafe (Northern Territory Work Health Authority)</p>	<p>Approved private sector insurers (4)</p> <p>Self-insurers (5)</p> <p>Northern Territory Government (Department of</p>	<p>Approved insurers (Allianz - also trading as TIO, CGU, GIO, QBE)</p> <p>Self-insurers (1/5 delegates claims</p>	<p>141,380 (workers under the scheme)</p> <p>~5,752 (self-insurer workers)</p>	<p><i>Return to Work Act 1986</i> (NT)</p>	<p>Mediation coordinated by NT WorkSafe</p> <p>Work Health Court</p>

⁴ Treasury Managed Fund provides coverage to government agencies including public service workers: State Insurance Regulatory Authority, 'How to get workers compensation insurance' (webpage).

Improving the experience of injured workers

Jurisdiction ^{1326F}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
			Attorney General and Justice) self-insures public servants	management to EML) Northern Territory Government delegates claim management to Gallagher Bassett			
South Australia	Publicly underwritten and regulated by a statutory body Outsourced claims management	ReturnToWork SA (RTWSA)	RTWSA Private self-insurers (71) Crown (state Government) self-insurers (41)	RTWSA delegates claims management to two private sector agents (EML & Gallagher Bassett) Self-insurers	768,214 (workers under the scheme) ~486,000 (self-insurer workers, 36.86% by remuneration)	<i>Return to Work Act 2014</i> (SA) <i>Return to Work Corporation of South Australia Act 1994</i> (SA) <i>South Australian Employment Tribunal Act 2014</i> (SA)	South Australian Employment Tribunal Supreme Court RTWSA Premium Review Panel
Tasmania WC	Privately underwritten and managed by authorised insurers Regulated by a statutory body	WorkCover Tasmania Board (Department of Justice) assisted by WorkSafe Tasmania	Private sector insurers (7) Self-insurers (11)	Private sector insurers (Allianz, CCI, CGU, GIO, Guild, QBE, Zurich) Self-insurers	227,064 (workers under the scheme) ~10,710 (self-insurer workers)	<i>Workers Rehabilitation and Compensation Act 1988</i> (Tas) <i>Asbestos-Related Diseases (Occupational Exposure) Compensation Act 2011</i> (Tas)	Workers Rehabilitation and Compensation Tribunal Supreme Court

Improving the experience of injured workers

Jurisdiction ^{1326F1}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
						<i>Workers' (Occupational Diseases) Relief Fund Act 1954 (Tas)</i>	
Queensland	Publicly underwritten by statutory body Insourced claims management Regulated by a Government Department	Office of Industrial Relations (Department of Education Queensland)	WorkCover Queensland Self-insurers (29)	WorkCover Queensland (catastrophic claims managed by the 'National Injury Insurance Agency Queensland') Self-insurers (4/29 self-insurers delegate claims management to claims administrators)	2,279,303 (workers under the scheme) ~169,100 (self-insurer workers)	<i>Workers' Compensation and Rehabilitation Act 2003 (Qld)</i>	Medical Assessment Tribunal Office of Industrial Relations Queensland Industrial Relations Commission Industrial Magistrate, Industrial Court
Western Australia	Privately underwritten and managed by authorised insurers Regulated by a statutory body	WorkCover WA	Private sector insurers (8) Self-insurers (25 'exempt employers') Insurance Commission of	Private sector insurers (Allianz, CCI, CGU, GIO, Guild, QBE, WFI, Zurich) Self-insurers ICWA	1,230,161 (workers under the scheme) ~103,521 (self-insurer workers)	<i>Workers' Compensation and Injury Management Act 1981 (WA)</i>	Conciliation and Arbitration Services

Improving the experience of injured workers

Jurisdiction ^{1326F¹}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
			Western Australia (ICWA) ^{1330F⁵}				
Australian Federal compensation schemes							
Commonwealth Comcare	Publicly underwritten and regulated by a statutory body Hybrid insourced/ outsourced claims management	Comcare	Comcare national self-insurers declared eligible by the federal minister (39)	Commonwealth claims managed by Comcare, or delegated to private sector claims administration agents Allianz and Gallagher Bassett Self-insured claims managed by: -Self-insurers -Delegated claims administrators	405,230 (workers under the scheme) ~188,158 (self-insurer workers)	<i>Safety, Rehabilitation and Compensation Act 1988</i> (Cth) ^{1331F⁶}	Administrative Appeals Tribunal Federal Court
Commonwealth Seacare	Privately underwritten and	Seafarers Safety, Rehabilitation and Compensation	Authorised private sector insurers (5)	Authorised Insurers (Allianz, CGU, Liberty)	3885 (workers under the scheme)	<i>Seafarers Rehabilitation and</i>	Administrative Appeals Tribunal

⁵ ICWA is the statutory corporation insuring Western Australian Government employees: Government of Western Australia, 'About us', *Insurance Commission of Western Australia* (Web page) <<https://www.icwa.wa.gov.au/about-us>>.

⁶ All Comcare employers must provide workers compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). However the health and safety requirements of self-insurance granted licenses after 2011 are not automatically covered under the *Work Health and Safety Act 2011* (Cth) and may continue to be regulated by their relevant state or territory health and safety regulators: Australian Government, Safety, 'Licensees', *Rehabilitation and Compensation Commission* (Web Page, 1 December 2020) <https://www.srcc.gov.au/information_for_self-insurers/licensees>.

Improving the experience of injured workers

Jurisdiction ^{1326F1}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
	<p>managed by authorised insurers</p> <p>Regulated by a statutory body</p>	Authority (Seacare Authority) ^{1332F7}	Seafarers Safety Net Fund (Seacare/ Comcare)	<p>International Underwriters, QBE, Vero Insurance/GIO)</p> <p>Comcare</p>		<p><i>Compensation Act 1992 (Cth)</i></p> <p><i>Seafarers Rehabilitation and Compensation Levy Act 1992 (Cth)</i></p> <p><i>Seafarers Rehabilitation and Compensation Levy Collection Act 1992 (Cth).</i></p>	Federal Court
National Disability Insurance Scheme (NDIS)	<p>Publicly underwritten by statutory body</p> <p>Insourced claims management</p> <p>Regulated by a government department</p>	Commonwealth Minister for the NDIS and Minister for Government Services, supported by the Department of Social Services and the Disability Reform Council (Disability Reform Ministers)	National Disability Insurance Agency (NDIA)	National Disability Insurance Agency ^{1333F8}	~400,000 participants with an NDIS plan	<i>National Disability Insurance Scheme Act 2013 (Cth)</i>	<p>NDIA internal review</p> <p>Administrative Appeals Tribunal (AAT)</p> <p>Complaints regarding services provided under NDIS can be made to 'NDIS Quality and Safeguards</p>

⁷ The Seacare Authority does not employ staff, therefore Comcare provide policy, administrative and secretariat support to the Seacare Authority, including claims management: Seafarers Safety, Rehabilitation and Compensation Authority, *Seacare Corporate Plan 2020-21* (Report, August 2020) 5 <https://www.seacare.gov.au/__data/assets/pdf_file/0011/294257/seacare-authority-corporate-plan-2020-21.pdf>.

⁸ Approved 'Local Area Coordinators' are contracted to provide claimants with advice about accessing services in the community, however they do not manage claims on NDIA's behalf.

Improving the experience of injured workers

Jurisdiction ^{1326F1}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
							Commission' (NDIS Commission)
Overseas workers' compensation schemes (sample)							
British Columbia (Canada), Workers Compensation	Publicly underwritten by statutory body Insourced claims management Regulated by Government Department	Ministry of Labour	WorkSafe British Columbia (WSBC)	WSBC	~2,510,000 (covers ~97% of workers Remaining 3% are self-employed or cross-provincial employees) 1334F ⁹	<i>Workers Compensation Act</i> (RSBC 2019) c.1	WSBC Workers' Compensation Appeal Tribunal (WCAT) British Columbia Supreme Court
New Zealand, Accident compensation	Publicly underwritten and managed by a statutory body Insourced claims management	Ministry of Business, Innovation and Employment, supported by Treasury	Accident Compensation Corporation (ACC) Self-insurers (140)	ACC 'Recovery Teams' are distributed across the country. Self-insurers	1,913,571 (workers under the scheme) ~353,000 (self-insurer workers)	<i>Accident Compensation Act 2001</i> (NZ)	ACC1335F ¹⁰ District Court

9 Consultation 24 (WorkSafeBC).

10 The Code of ACC Claimants' Rights confers rights on claimants and imposes obligations on ACC in relation to how ACC should deal with claimants: *Injury Prevention, Rehabilitation, and Compensation (Code of ACC Claimants' Schedule Rights) Notice 2002* (NZ) SR 2002/390.

Improving the experience of injured workers

Jurisdiction ^{1326F1}	Summary of scheme model	Regulator	Insurer/ Underwriter	Claims Manager	Population covered	Legislation	Disputes
	Regulated by Government Department						
State of Washington (USA), Workers Compensation	Publicly underwritten, managed and regulated by a single government department Insourced claims management	Department of Labour and Industry (L&I)	L&I Self-insurers (351)	L&I Self-insurers ^{1336F11}	2,600,000 (workers under the scheme) ~950,683 (self-insurer workers)	<i>Industrial Insurance Act in Washington State (Revised Code of Washington (RCW), Title 51) Washington Administrative Code (WAC) Title 296</i>	L&I Board of Industrial Insurance Appeals (BIIA) Office of Administrative Hearings Washington Superior Court Court of Appeals

¹¹ Most self-insurers in the State of Washington use one of some 58 claims administrators published on L&I's website. Administrative oversight and some specific decisions, such as initial claim determination and closure of disputed claims, are made by a separate section of L&I, called the L&I Self-insurance Division.

Key workers compensation scheme statistics¹²

	NSW	Vic	Qld	WA	SA	Tas	NT	ACT	Comcare	NZ	Wash'ton	British Columbia
Employees covered ('000)	3,612	2,967	2,279	1,230	768	227	141	147 Non-govt	405	1,914	2,600	2,510
>one week incapacity	34,859	21,716	26,702	11,183	5,904	2,629	957	1,728	1,568	27,046	16,790	57,616
>one week incapacity / 1,000 employees	9.7	7.3	11.7	9.1	7.7	11.6	6.8	10.0	3.9	14.1	6.5	22.95
Scheme funding	Managed	Central	Central	Private insurers	Central	Private insurers	Private insurers	Private insurers	Central	Central	Central	Central
Standardised Average Premium rate (% of payroll)	1.38	1.32	1.15	1.16	1.89	1.41	1.46	1.72	0.84	0.54	1.57	1.55
Funding Ratio (%) ¹³	115	123	181	N/A	119	N/A	N/A	N/A	116	135	64	152
Excess/ Unfunded (\$million)	\$2,420 excess	\$3,099 excess	\$2,443 funded	N/A	\$528 excess	N/A	N/A	N/A	\$353 excess	\$2,527 excess	(\$10,358) deficit	\$6,620 excess
Access to Common Law	Yes — limited	Yes — limited	Yes	Yes	Yes — limited	Yes	No	Yes	Yes — limited	No	No	No

12 Australian and New Zealand statistics are from 2017-18 statistics derived from Safe Work 2019 (n 1) 21, 231, 233.

13 Funding ratio measures the ratio of assets to outstanding claims liability. Greater than 100% means that the scheme has more funding than it needs to cover its liabilities, less than 100% means that liabilities exceed assets: Safe Work 2019 (n 1) 230.

Appendix F – Options paper

Introduction

The purpose of this options paper is to seek targeted feedback from individuals and organisations who are involved in the Victorian workers' compensation scheme, or who have expertise in workers' compensation schemes more broadly. Accordingly, this paper assumes an understanding of the agent model as part of the current workers' compensation system, as well as a level of familiarity with the 2016 and 2019 Ombudsman's reports.

The central questions for this Review under its Terms of Reference are:

- **How** should complex claims be managed; and
- **Who** should manage complex claims

to maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme?

The Review is now significantly advanced in its work. The Reviewer is currently considering options to address the problems identified in previous reviews and through earlier consultations for the Review.

Chapter 1 provides a brief background to the Review and summarises several previous reports into the handling of complex workers' compensation claims.

Chapter 2 summarises what the Review heard during consultation and in written submissions received to date.

Chapter 3 describes the options currently under consideration by the Reviewer and the potential advantages and disadvantages of each. These are working options—they are not finalised, nor do they reflect the concluded views of the Reviewer.

The Review seeks your input on which of the options described in this paper should be preferred, and why. In preparing your submission, you may wish to consider questions 1- 5 below. Where possible, you should provide evidence, such as data and documents, to support the views in your submission.

In responding to the options that are described in this paper, please consider the following:

1. What factors should the Reviewer consider in identifying a preferred option?
2. Which option best provides for the effective management of complex claims and why?
3. What would be required for your preferred option to be implemented?

Improving the experience of injured workers

4. Is there another option, or combination of options, which could more effectively address the problems identified in the management of complex claims? If so, please describe how it would work.
5. Are there other considerations that the Reviewer should be aware of, such as any additional unintended consequences of a particular option?

There may also be other aspects or additional considerations that you consider should be included as features of any recommendation for reform to the Victorian workers' compensation scheme. The Review invites you to bring these to the attention of the Reviewer. Other aspects or considerations may include, but are not limited to:

- the role of case management in preventing or responding to complex claims
- the utility of a pilot program or interim measures before any wholesale change is implemented
- whether there is need for an advocate to guide injured workers through the Victorian workers' compensation scheme
- the emerging challenge of an increasing proportion of mental health injury claims.¹

The Review invites you to highlight any other aspects or considerations you consider necessary in your response to the options paper.

Information about responding to the options paper is contained in chapter 4.

¹ The proportion of mental health injury claims has been increasing over the past few years across all Australian jurisdictions. WorkSafe's 2020 annual report indicates that 14.3% of new Victorian claims in 2019/20 were for mental injury, up from 14% in 2018/2019 and 12.6% in 2017/2018. WorkSafe Victoria, *Annual Report 2019–2020* (Report, 2020) 1.

1. Background to the Review

Purpose of the chapter

- 1.1 The purposes of this chapter are to:
- briefly describe the scope of the Review; and
 - detail the 2016 and 2019 Ombudsman’s reports and other workers’ compensation reviews.

Scope of the Review

- 1.2 On 3 February 2020, the Hon Jill Hennessy MP, Attorney-General and then Minister for Workplace Safety appointed Peter Rozen QC to conduct an independent review into the management by WorkSafe agents of complex workers’ compensation claims.
- 1.3 The Terms of Reference for the Review were released by Minister Hennessy on 26 June 2020.²
- 1.4 Mr Rozen QC is tasked with making recommendations that respond to the Terms of Reference. In summary, the Review is required to:
- investigate the adequacy, suitability and effectiveness of the agent model;
 - make recommendations to improve the management of complex workers’ compensation claims in a way that maximises outcomes for injured workers; and
 - in so doing, have regard to the financial viability of the scheme.
- 1.5 The Review was originally due to deliver its recommendations and report to the Minister for Workplace Safety in March 2021. It is now due to report to the Minister for Workplace Safety, Ms Ingrid Stitt MLC, in April 2021.

What is a ‘complex claim’?

- 1.6 The Terms of Reference provide that ‘...complex claims are defined as those where the injured worker has received 130 weeks or more of weekly payments (including claims that were suspended or terminated during this period)’.³
- 1.7 This definition needs to be read together with paragraph 14 of the Terms of Reference:

² The full Terms of Reference for the Review are at Appendix A.

³ Terms of Reference, para 13.

Improving the experience of injured workers

However, irrespective of the complexity of a claim, the Review should consider the personal circumstances of claimants which may ultimately contribute to them having 'complex claims', as defined at 130 weeks.

- 1.8 The Review heard in consultations that this definition of complex claims is too narrow.⁴
- 1.9 Complex claims make up only a small proportion of total claims. As at June 2018, complex claims made up around a quarter of the 18,519 active weekly payments claims, or approximately seven per cent of the total 63,085 active claims.
- 1.10 However, these complex claims represented approximately 90 per cent of the scheme's liabilities.⁵ Complex claims also account for a relatively high number of complaints received by WorkSafe and the Victorian Ombudsman.
- 1.11 The 2016 Ombudsman's report examined 65 claims which had been identified by WorkSafe as complex claims. Such a claim was described in the 2016 report as:

...a claim that involves a long term period of incapacity (which may or may not be continuous) and/or long term requirement for medical treatment.⁶
- 1.12 Along with observing that complex claims make up a small number of new claims, but a significant proportion of the scheme's liabilities, the report noted that 'such complex claims often involve associated mental health issues, further complicating claims management'.⁷

2019 Ombudsman's report and past reviews

- 1.13 The first investigation by the Ombudsman into complex workers' compensation claims was in 2016. The 2019 investigation was the first time the Ombudsman conducted a follow up investigation after an earlier investigation. These investigations were preceded by two important investigations into the same subject matter by the Victorian Auditor-General in 2001 and 2009.⁸
- 1.14 The Ombudsman's key findings in her 2019 report included:

⁴ See 2.15-2.19 of the options paper for additional discussion on issues regarding the definition complex claims.

⁵ Victorian Ombudsman, *Investigation into the Management of Complex Workers Compensation Claims and WorkSafe Oversight* (Report, September 2016) 17 ('Victorian Ombudsman 2016').

⁶ Ombudsman 2016 (n 5) 17.

⁷ Ombudsman 2016 (n 5) 17.

⁸ Victorian Auditor-General's Office, *Management of claims by the Victorian WorkCover Authority* (Report, November 2001) ('VAGO 2001'); Victoria Auditor-General's Office, *Claims Management by the Victorian WorkCover Authority* (Report, June 2009) ('VAGO 2009').

Improving the experience of injured workers

- that unreasonable decision making by agents on complex claims had continued, despite the findings relating to this in the 2016 report;⁹
- there was evidence showing agents continued to focus on terminating claims and maximising profit, and that financial rewards and penalties were influencing agents' offers at conciliation;¹⁰ and
- WorkSafe was not optimally using its oversight mechanisms to address unreasonable agent decision making on individual complex claims, or in identifying and responding to systemic issues.¹¹

1.15 The 2019 report reached the following conclusions:

After two investigations by the Ombudsman and a number of reviews commissioned by WorkSafe, the evidence points to this being a systemic problem. In too many complex claims, the system is failing to achieve one of the scheme's objectives under the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic), which is to ensure appropriate compensation be paid to injured workers 'in the most socially and economically appropriate manner, as expeditiously as possible'.

As piecemeal changes have proven unsuccessful in tackling these problems, more significant changes to the way complex claims are managed are needed to ensure better outcomes for these most vulnerable injured workers.¹²

1.16 Significantly, the Ombudsman also made findings pursuant to s 23(1)(b) and (g) of the *Ombudsman Act 1973* (Vic) that:

- identified specific complex claims where all five agents had acted 'unreasonably' or 'unjustly' or made decisions that were wrong or unjust;¹³ and
- WorkSafe itself had 'acted in a manner that was unjust and wrong' in respect of decisions it had made concerning certain identified claims.¹⁴

9 Victorian Ombudsman, *WorkSafe 2: Follow-up investigation into the management of complex workers compensation claims* (Report, December 2019) ('Victorian Ombudsman 2019') 219.

10 Victorian Ombudsman 2019 (n 9) 220.

11 Victorian Ombudsman 2019 (n 9) 221.

12 Victorian Ombudsman 2019 (n 9) 219.

13 Victorian Ombudsman 2019 (n 9) 223.

14 Victorian Ombudsman 2019 (n 9) 223. *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) sections 23(1)(b) and (g) respectively enable the Ombudsman to form the opinion that 'administrative action' which has been investigated was 'unreasonable, unjust, oppressive' or 'wrong'.

Improving the experience of injured workers

- 1.17 The Ombudsman made two recommendations directed to the Victorian Government and 13 directed to WorkSafe. The Victorian Government and WorkSafe accepted all recommendations.¹⁵
- 1.18 In addition to implementing recommendation 1 by committing to this Review, the Victorian Government also accepted the Ombudsman’s recommendation to ‘introduce a new dispute resolution process which allows for binding determinations on the merits of claim decisions; is inexpensive; and provides timely outcomes’.¹⁶
- 1.19 The steps WorkSafe has taken to respond to the recommendations in the 2019 Ombudsman’s report include the following:
- Implementing a new streamlined service to manage complaints;
 - Introducing policy changes to mandate a 28-day timeframe for agents to make decisions about reinstating weekly payments and medical and like treatment;
 - Increasing oversight of certain mental injury claims that are rejected by agents;
 - Changing the Independent Medical Examiner (specialist doctors that examine and assess injured workers at the request of agents) appointment process for workers with complex needs; and
 - Commencing the Workers’ Compensation Independent Review Service on 30 April 2020.

The Review

- 1.20 The Review notes the objectives of the scheme as described in section 10 of the *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic):

10 Objectives of Act

The objectives of this Act are to—

- (a) reduce the incidence of accidents and diseases in the workplace; and
- (b) make provision for the effective occupational rehabilitation of injured workers and their early return to work; and

¹⁵ Victorian Ombudsman 2019 (n 9) 224-227.

¹⁶ Victorian Ombudsman 2019 (n 9) 11.

Improving the experience of injured workers

- (c) increase the provision of suitable employment to workers who are injured to enable their early return to work; and
- (d) ensure appropriate compensation under this Act or the Accident Compensation Act 1985 is paid to injured workers in the most socially and economically appropriate manner, as expeditiously as possible; and
- (e) ensure workers compensation costs are contained so as to minimise the burden on Victorian businesses; and
- (f) establish incentives that are conducive to efficiency and discourage abuse; and
- (g) enhance flexibility in the system and allow adaptation to the particular needs of disparate work situations; and
- (h) maintain a fully-funded scheme; and
- (i) in this context, to improve the health and safety of persons at work and reduce the social and economic costs to the Victorian community of accident compensation.¹⁷

¹⁷ *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) s 10.

2. What the Review has heard

Key points

- Complex claims can and should be identified well in advance of 130 weeks. A definition of complex claims based on 130 weeks is too narrow and duration should not be the only measure.
- Once a claim reaches 130 weeks, the chances of the injured worker returning to health and work are much reduced.
- Early identification of complex claims is critical—successful interventions to improve health outcomes and provide for a sustained return to work are most likely if appropriate treatment and support occurs early.
- Biopsychosocial models and tools are effective in defining, identifying and addressing complexity.
- Current management of complex claims by agents is not effective.
- Person-centred approaches to the management of claims should be implemented that provide tailored treatment and support based on biopsychosocial factors, individual circumstances and medical advice.
- WorkSafe oversight of agents is ineffective.

Purpose of the chapter

- 2.1 The purposes of this chapter are to:
- describe the consultation undertaken to date;
 - provide an overview of themes and issues from consultation; and
 - provide preliminary conclusions from consultation, which inform the options described in chapter 3.

Consultation process

- 2.2 The Review has consulted widely using a variety of methods and formats. The variety of methods aimed to ensure all interested groups and individuals could contribute using a form of communication that best suits their needs.
- 2.3 The Review has received 1182 visitors to its webpage on the Engage Victoria website www.engage.vic.gov.au/victorian-workers-compensation-system-independent-review. The webpage provides information about the Review including an overview, timeline, a survey and a discussion paper.

Improving the experience of injured workers

- 2.4 Consultation was guided by the discussion paper released on 10 August 2020. The Review received 58 submissions from a wide range of individuals and organisations.
- 2.5 Following the release of the discussion paper, the Review organised consultations with interested groups and individuals, including injured workers, WorkSafe agents, unions, healthcare providers, employer representative bodies, lawyers and organisations involved in the dispute process.
- 2.6 Because of the restrictions on movement due to COVID-19, all consultations have been virtual, using widely available videoconferencing facilities. Consultations generally took a roundtable format, bringing together a range of individuals and organisations with similar interests.
- 2.7 Consultations allowed the Reviewer to listen to and speak directly with a wide range of people and organisations. To date, 19 video-conference consultations and roundtables have been held in which 118 people have participated.
- 2.8 Two virtual forums were held with workers who had sustained workplace injuries and have direct experience of the claims process. These forums provided an opportunity for the workers to present their experiences and views on the current claims management system, and discuss potential solutions.
- 2.9 The Review has also consulted twice with a panel of experts, which included researchers and people with experience in workers' compensation schemes in both Australia and overseas.
- 2.10 The Review webpage also offered an online survey. The survey provided an opportunity for people to tell the Review their story without having to provide a formal submission. The survey gave people the option of providing feedback anonymously. The survey received 72 responses from 66 contributors. A high proportion of survey responses were from injured workers (forty-seven per cent).
- 2.11 The Review expresses its gratitude to all who have been prepared to share their experience, expertise and views about the Victorian workers' compensation system and how it can be improved.

Themes and issues from consultations

- 2.12 The Review secretariat analysed input from virtual consultations and forums, written submissions and survey responses to identify themes and issues.
- 2.13 This input from the consultation process has been invaluable. This section provides an overview of issues and common themes from consultation.

2.14 Many issues and themes were common across interest groups. The following overarching themes and issues emerged during consultation:

- Complex claims can and should be identified well in advance of 130 weeks;
- Mental health injuries and poor relationships with the employer, colleagues or an agent are key factors in predicting complexity;
- Biopsychosocial models are effective in defining and identifying complexity;
- Current management of complex claims by agents is not effective;
- WorkSafe oversight of agents is not effective; and
- Substantial change is needed.

Defining complex claims

2.15 Almost uniformly, individuals and groups across all interest groups told the Review that:

- the definition of complex claims is too narrow—once a claim reaches 130 weeks, the chances of the injured worker returning to health and work are much reduced;
- duration should not be the only measure of complexity;
- claims at risk of complexity can be identified well in advance of 130 weeks and, in many cases, after a few weeks;
- assessments of complexity must consider the individual factors and circumstances of the injured worker; and
- early identification of complexity is critical—successful interventions to improve health outcomes and provide for a sustained return to work are most likely if appropriate treatment and support occurs early.

2.16 Submissions identified factors that may indicate a claim is complex, or at risk of becoming complex. There was widespread agreement across interest groups on many of the factors that may lead to complexity. A number of submissions stated that complexity often arises from a combination of factors, rather than a single factor. Factors frequently identified as linked to complexity were:

- Nature or severity of injury, including the measures and extent of rehabilitation;
- Mental/psychological injury (primary or secondary);
- Relationship with the employer/ workplace;
- Relationship with the agent and case management;
- Duration of claim; and
- Individual circumstances of the injured worker.

Improving the experience of injured workers

- 2.17 Many people told the Review that any assessment or definition of complexity needs to use a biopsychosocial model, rather than a purely biomedical model. A biopsychosocial model sees illness and health as the result of an interaction between biological, psychological and social factors.
- 2.18 A number of submissions identified the need for triage tools and suggested a range of existing triage tools that might be used or adapted for use in identifying complexity. A key point made by numerous submitters across all interest groups was that a 'human touch' is needed to assess and manage complexity. Reliance on automated triaging alone is insufficient.
- 2.19 The Review heard overwhelmingly that 130 weeks is not a useful point in time to identify complex claims. Numerous consultations and submissions highlighted that outcomes for the injured worker are improved if claim complexity is identified early and managed proactively. This should include targeted treatment and support.

Case management of complex claims by agents

- 2.20 The majority of people with whom the Review consulted explained that the current management of complex claims by agents is unsatisfactory or ineffective.
- 2.21 Particular issues with case management of complex claims included:
- Case managers change frequently, creating a lack of continuity in case management;
 - The system is not sufficiently flexible to support individual needs;
 - The advice of Independent Medical Examiners is prioritised ahead of the advice of treating medical practitioners; and
 - There are unsatisfactory delays in decision-making, which have a negative impact on the injured worker.

Oversight and evaluation

- 2.22 A number of responses to the Review considered that WorkSafe's oversight of agents has not been effective.
- 2.23 An issue raised in relation to improving oversight was the need for greater transparency in the system including of agent contracts, agent evaluation, and agent performance data.
- 2.24 Some submissions raised recent changes to WorkSafe's oversight and evaluation methods since the 2019 Ombudsman report was published. Many considered that it is too early to assess the effectiveness of these measures.

What needs to change in the case management of complex claims?

2.25 The Review asked the people with whom it consulted what needed to change in the management of complex claims. Responses included:

- There are a number of difficult questions to be answered in the implementation of any reform that seeks to treat ‘complex’ claims separately from ‘simple’ claims;
- Financial incentives for agents are not appropriate;
- Agent decision-making needs to be improved—this may require training in legal and medical terminology and concepts;
- Assistance navigating the scheme would be beneficial—several respondents to the survey suggested an independent party or service to provide workers with support and advice about navigating the system;
- Complex claims should be managed in a centralised team either within agents or within WorkSafe;
- Management of complex claims should be ‘brought back’ into public hands;
- The Independent Medical Examiner model should be reviewed, and greater reliance placed on treating practitioners’ medical opinions; and
- The maximisation of outcomes for injured workers cannot be expected if the outsourced agent model is maintained.

3. Options under consideration

Key points

- The paper presents seven options:
- **Option 1** is the baseline option. All workers' compensation claims, whether 'complex' or otherwise, would continue to be managed as they currently are using the outsourced 'agent model'.
- **Option 2** would require each agent to establish a dedicated complex claims unit to manage complex claims.
- **Option 3** would require WorkSafe to appoint a single, specialised agent to manage complex claims.
- **Option 4** would require WorkSafe to establish a dedicated complex claims unit within WorkSafe to manage complex claims. Claims would be triaged by agents.
- **Option 5** would also require WorkSafe to establish a dedicated complex claims unit within WorkSafe to manage complex claims. Claims would be triaged by WorkSafe.
- **Option 6** would introduce a hybrid claims management model between WorkSafe and agents with an increased decision-making and oversight function for WorkSafe.
- **Option 7** would abolish the 'agent model', with all claims (including complex claims) managed directly by WorkSafe.

Purpose of the chapter

- 3.1 The purposes of this chapter are to:
- present the options identified by the Reviewer;
 - describe how the options could work in practice; and
 - discuss the key advantages and disadvantages of each option.

Option 1 — (status quo/baseline)

Description of the option

- 3.2 Option 1 does not introduce any changes. All workers' compensation claims, whether 'complex' or otherwise, would continue to be managed as they currently are using the outsourced 'agent model'.

Improving the experience of injured workers

- 3.3 Option 1 does not make any changes to the existing system for who manages claims, and how they are managed. However, it may address some of the issues raised by the Ombudsman as it assumes WorkSafe and Government implementation of the 2019 Victorian Ombudsman recommendations.

How it would work

- 3.4 Because this option would result in no change, workers' compensation claims, 'complex' or otherwise, would continue to be managed as they are currently, by agents appointed by WorkSafe using a common contract.
- 3.5 WorkSafe would retain oversight of agent functions and performance. A function or power performed or exercised by an agent is taken to have been performed or exercised by WorkSafe.
- 3.6 Employers must select one of the five agents to manage their WorkCover insurance policy and any claims lodged by their workers. Injured workers cannot select who manages their claim.
- 3.7 Both the Victorian government and WorkSafe would continue to implement the recommendations in the Ombudsman's 2019 report.

Advantages

- 3.8 Claims management in Victoria has been outsourced since 1985. The existing system for the management of claims is well established and understood by parties who use it, such as WorkSafe, agents, employers, unions, healthcare providers and dispute resolution services. Continuing to use the agent model would provide no disruption to those currently in the workers' compensation system. This option would provide for scheme stability and would not add any additional costs to the administration of the scheme.
- 3.9 Some submissions to the Review suggested that the competition among agents drives innovation and improves services. Option 1 would retain this benefit, although it should be noted that other submissions disputed the idea that competition between agents improved claims management.
- 3.10 Continued operation of the existing system would allow time for the 2019 recommendations from the Ombudsman to be implemented and embedded. This would enable an assessment to be made about whether implementation of the recommendations alone sufficiently addresses the concerns raised in the Ombudsman's 2016 and 2019 reports.

Disadvantages

- 3.11 The current system is widely viewed as inadequate to ‘maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme’, as required by the Review’s Terms of Reference.¹⁸ This view of the system being inadequate includes both how claims are managed and who should manage them.
- 3.12 The Ombudsman’s 2019 investigation concluded that, in too many complex claims, the system fails to ensure that adequate compensation is paid to injured workers ‘in the most socially and economically appropriate manner, as expeditiously as possible’.¹⁹ The report concluded that ‘[n]othing short of wholesale changes to the system will address the issues identified by both the 2016 investigation and the current one’.²⁰ Option 1 does not involve any change, let alone ‘wholesale change’.
- 3.13 The Review also heard repeatedly during consultation and in submissions that while the changes recommended by the Ombudsman and currently being implemented may be positive, they do not go far enough. The ‘status quo’ option, even with the implementation of the 2019 Ombudsman recommendations, does not appear to go far enough to address the significant concerns raised. Waiting to see if implementation of the 2019 recommendations in and of themselves is sufficient would mean that many more workers are exposed to what is broadly viewed as an ineffective system.

Option 2 — Dedicated unit for complex claims set up within agents

Description of the option

- 3.14 Option 2 would require each agent to establish a dedicated complex claims unit to manage complex claims. Complex claims would remain within the same agent, but once identified as complex they would be transferred to a dedicated team within the agent for claims management. The agent’s complex claims unit would be appropriately resourced and staffed with a multidisciplinary team to provide best practice, tailored treatment and support of injured workers based on biopsychosocial factors, individual circumstances and medical advice.
- 3.15 The requirement to have a dedicated complex claims unit with appropriate staffing would be included in agent contracts.

¹⁸ Terms of Reference, para 12.

¹⁹ Victorian Ombudsman 2019 (n 9) 219.

²⁰ Victorian Ombudsman 2019 (n 9) 11.

- 3.16 Successful implementation of this option would require:
- clarity about the definition of a 'complex' claim;
 - clarity and consistency about how, when and by whom claims are triaged and assessed for complexity;
 - clear protocols for the administrative transfer of claims to ensure continuity of case management and avoid the injured worker having to repeat what they have told others; and
 - consideration of the workload that can be appropriately managed by one case manager to 'maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme'.²¹
- 3.17 Once identified, complex claims would be transferred within agents to be managed by the specialised unit. It is unclear how much this would differ from current agent practice. The Review seeks information about that question from agents.

How it would work

- 3.18 Agents would continue to manage all claims assigned to them, whether complex or otherwise.
- 3.19 Claims that are identified as complex, either at initial triage or subsequently, would be managed by the dedicated complex claims unit within each agent. In contrast to options 3, 4 and 5, described below, which transfer complex claims to a specialised agent or WorkSafe respectively, claims would remain within the agent.
- 3.20 An assessment of complexity would not be based solely on the duration of the claim. All claims that went beyond 130 weeks would be considered complex, but duration would not be the only measure of complexity. Assessment of claims would need to consider the individual factors and circumstances of the worker.
- 3.21 Claims would be assessed initially for complexity and reassessed for complexity at particular points in their lifecycle. There would need to be clear protocols about how and when claims are reassessed for complexity. Triggers for a reassessment of complexity could be 'rule of thumb' point in time triggers, such as monthly, or at time milestones such as 26 weeks or 52 weeks, with a default classification of complex at 130 weeks.

²¹ Terms of Reference, para 12.

Improving the experience of injured workers

- 3.22 In addition, a complexity assessment could be triggered by key claim events or milestones, such as:
- a capacity change;
 - approval of surgery;
 - when treatment commences;
 - when ongoing treatment is requested;
 - if disputes arise; or
 - if the injured worker's employment is terminated.
- 3.23 In addition to a decision about what the trigger for a reassessment of complexity is, there would also need to be clarity about whether interested parties, such as the injured worker, employer or agent can request a complexity assessment. Should classification decisions be reviewable and if so by whom?

Advantages

- 3.24 Retaining claims management within the agent which has been managing the claim may help provide better continuity of case management for injured workers. The transfer of a claim from one case manager to another may be quicker and more seamless if it occurs within a single agent. There are also fewer communications barriers involved in transferring a claim within an agent, rather than transferring it to another organisation such as WorkSafe, because the past claims manager would be more readily available to provide information and support.
- 3.25 Keeping complex claims management within an agent would have the advantage of leveraging the existing agent workforce and infrastructure for complex claims management. In contrast to options 4 and 5, where WorkSafe manages complex claims, agents have claims management staff and supporting infrastructure, systems and processes to manage complex claims.
- 3.26 Any successful change to the management of complex claims would need employer involvement. Agents have existing relationships with employers and communication channels between agents. It may be an advantage to retain claims management with agents because of these established relationships with employers.

Disadvantages

- 3.27 This model does not address concerns raised by the Ombudsman and with the Review that, as a business, an agent's key focus and duty to its shareholders is to make a profit. The risk remains that this profit motive may lead to compromised and unreasonable decision-making by agents.

- 3.28 Establishing a dedicated unit to manage complex claims within agents may not address some of the issues raised in the 2016 and 2019 Ombudsman reports and during consultation for this Review. There would still be multiple agents (currently five) and potential divergence of culture and application of decision-making frameworks. Although WorkSafe has oversight of agents and can incentivise particular behaviours through financial incentives, the Ombudsman and this Review have heard that oversight mechanisms are not effective.
- 3.29 The potential inability of this model to create a consistent culture and approach to the management of complex claims means that it may not result in a more worker-centric model because the 'client' is the employer, rather than the injured worker. The focus for agents may be the employer, rather than the worker. Agents would continue to be competing for the business of employers which are able to change agents; workers would continue to have no choice in agents.

Option 3 — Single specialised agent to manage complex claims

Description of the option

- 3.30 This option would require WorkSafe to appoint a single specialised agent to manage complex claims that is appropriately resourced and staffed to provide best practice, tailored treatment and support of injured workers.
- 3.31 The single agent could be one of the current authorised agents or another organisation. Some submissions suggested that the Transport Accident Commission (TAC) could manage complex claims on behalf of WorkSafe.
- 3.32 As with option 2, successful implementation of this option would require:
- clarity about the definition of a complex claim;
 - clarity about how, when and by whom claims are triaged and reassessed for complexity;
 - clear protocols for the transfer of claims to ensure continuity of case management and avoid the worker having to repeat what they have told others; and
 - consideration of the workload that can be appropriately managed by one case manager to 'maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme'.

How it would work

- 3.33 Agent contracts would set out requirements related to identification of complex claims and transfer to the specialised agent.

Improving the experience of injured workers

- 3.34 Claims would be assessed initially for complexity and reassessed for complexity at particular points in their lifecycle.
- 3.35 The specialised agent would need to be adequately resourced and staffed to manage complex claims appropriately.
- 3.36 In common with option 2 there would need to be clear protocols about how, when and by whom claims are reassessed for complexity. These considerations are described in more detail in paragraphs 3.21–3.22.
- 3.37 An assessment of complexity would not be based solely on the duration of the claim. All claims that went beyond 130 weeks would be considered complex, but duration would not be the only measure of complexity. Assessment of claims would need to consider the individual factors and circumstances of the worker.
- 3.38 Complex claims identified after initial triage would be transferred to the specialised complex claims agent.

Advantages

- 3.39 This option would have a single agent managing complex claims, which means that there would be increased specialisation within that agent. This could assist with recruitment and retention of staff.
- 3.40 A single agent managing complex claims may increase the chances of a worker-centric culture being built within the agent.
- 3.41 The use of a single agent to manage complex claims could help improve consistency of claims management through consistent application of the decision-making framework. If the TAC was selected, it could draw on its long history of management of claims which has been praised by a number of people with whom the Review has consulted.

Disadvantages

- 3.42 The use of a specialised agent to manage complex claims risks a lack of continuity and fragmentation in claims management. Continuity of claims management would be lost if the claim was transferred to a specialised agent and there would need to be clear protocols for handover. A lack of continuity would be an issue for injured workers as well as for employers. This might be particularly burdensome for employers if an employer has multiple claims managed by different teams and entities.

Improving the experience of injured workers

- 3.43 The transfer of complex claims to a dedicated complex claims agent may create perverse incentives for agents. Agents may have reduced incentive to manage claims that are seen as difficult or heading towards complexity.
- 3.44 The use of a specialised agent exposes WorkSafe to the risks associated with single point reliance. If the agent underperforms there may be little recourse for WorkSafe as it would not have a readily available alternative to manage claims. This could limit the effectiveness of WorkSafe's oversight.

Option 4 — Dedicated unit for complex claims set up in WorkSafe Victoria – agents triage

Description of the option

- 3.45 Many of the features of this option are similar to those of option 2 with the difference being that WorkSafe has a much greater role.
- 3.46 This option would require WorkSafe to establish a dedicated complex claims unit within WorkSafe itself to manage complex claims. It would be appropriately resourced and staffed with a multidisciplinary team to provide best practice, tailored treatment and support of injured workers based on biopsychosocial factors, individual circumstances and medical advice.
- 3.47 As with options 2, 3 and 5, successful implementation of this option would require:
- clarity about the definition of a complex claim;
 - clarity about how, when and by whom claims are triaged and reassessed for complexity;
 - clear protocols for the transfer of claims to ensure continuity of case management and avoid the worker having to repeat what they have told others; and
 - consideration of the workload that can be appropriately managed by one case manager to 'maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme'.

How it would work

- 3.48 Under this option, all claims would be assessed and triaged by agents, as is currently the case. The agents would determine if a claim is complex and, if so, would transfer it to WorkSafe.
- 3.49 Agents would continue to manage claims that are not deemed complex.

Improving the experience of injured workers

- 3.50 Agents would need to develop triaging tools and protocols and ensure staff are appropriately skilled to assess and triage claims.
- 3.51 Claims would be assessed initially for complexity and reassessed for complexity at particular points in their lifecycle.
- 3.52 In common with options 2, 3 and 5, there would need to be clear protocols about how, when and by whom claims are reassessed for complexity. These considerations are described in more detail in paragraphs 3.21–3.22.
- 3.53 An assessment of complexity would not be based solely on the duration of the claim. All claims that went beyond 130 weeks would be considered complex, but duration would not be the only measure of complexity. Assessment of claims would need to consider the individual factors and circumstances of the worker.
- 3.54 Complex claims identified at a later point in time than initial triage would be transferred from agents to the dedicated WorkSafe complex claims unit to be managed directly by WorkSafe. This differs from the current system where claims, including complex claims however defined, are managed by agents with WorkSafe providing oversight but no direct claims management.

Advantages

- 3.55 The transfer of complex claims to WorkSafe would address concerns that the profit-driven motive of insurance agents is incompatible with effective management of complex claims. Submitters pointed to TAC as an example of a public entity that manages claims well.
- 3.56 The establishment of a dedicated complex claims unit within WorkSafe would have the advantage of allowing a person-centred culture to be established within the unit from the outset. This would help address concerns raised in submissions to the Review that the current model is not worker-centric because the ‘client’ is the employer, rather than the injured worker. The Review heard that the approach to claims management needs to change so that the injured worker is seen as ‘the client’ and claims need to be managed with the injured person at the heart of the scheme. However, if this cultural change occurred it would be limited to complex claims.
- 3.57 This model will ensure WorkSafe deals directly with complex claims, providing WorkSafe with an opportunity to influence the impact complex claims have on the sustainability of the scheme. The Review heard during consultation that there is a perception that by outsourcing management of the claims, WorkSafe outsources

its responsibility. This appears also to have been the view of the Ombudsman.²² Other potential benefits include:

- greater consistency in decision-making; and
- the recruitment, retention and training of suitably qualified case managers, which would result in quality case management, decision-making and outcomes for injured workers.

Disadvantages

- 3.58 Transferring complex claims from agents to WorkSafe could result in a lack of continuity of case management for injured workers. If not managed well, it could also disrupt treatment. Employers also experience continuity and communication issues when case managers change and prefer a consistent point of contact with an understanding of their business.
- 3.59 Transfer of complex claims to WorkSafe poses infrastructure and staffing challenges. Agents have claims management staff and supporting infrastructure, systems and processes to manage complex claims, whereas WorkSafe does not. For WorkSafe to take on the function of complex claims manager, it would need to recruit suitably skilled staff to manage complex claims. This would inevitably involve some recruitment from existing agents, effectively shifting the current set of claims managers from one employer to another. Compared to option 5, having agents continue to assess and triage claims would reduce the new infrastructure and skills requirements for WorkSafe.
- 3.60 The transfer of complex claims from agents to WorkSafe may create perverse incentives for agents. Agents may have reduced incentive to manage claims that are seen as difficult or heading towards complexity. Instead, they may be incentivised to focus on having the claim transferred to WorkSafe.

Option 5 — Dedicated unit for complex claims set up in WorkSafe Victoria – WorkSafe triages

Description of the option

- 3.61 This option is identical to option 4, except that WorkSafe would assess and triage all claims initially. Those that were assessed as complex would be retained within WorkSafe and managed by a dedicated complex claims unit. All other claims would be transferred to agents.
- 3.62 As with option 4, this option would require WorkSafe to establish a dedicated complex claims unit within WorkSafe itself to manage complex claims. It would be

²² Victorian Ombudsman 2019 (n 9) 222.

Improving the experience of injured workers

appropriately resourced and staffed with a multidisciplinary team to provide best practice, tailored treatment and support of injured workers based on biopsychosocial factors, individual circumstances and medical advice.

3.63 As with options 2, 3 and 4, successful implementation of this option would require:

- clarity about the definition of a complex claim;
- clarity about and how, when and by whom claims are triaged and reassessed for complexity;
- clear protocols for the transfer of claims to ensure continuity of case management and avoid the worker having to repeat what they have told others; and
- consideration of the workload that can be appropriately managed by one case manager to 'maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme'.

How it would work

3.64 Under option 5, triage of claims would be centralised in WorkSafe. All claims would be lodged with WorkSafe and the triage would be performed by WorkSafe. Claims identified as complex during initial triaging would remain with WorkSafe and be managed by the dedicated WorkSafe complex claims unit from the outset.

3.65 Agents would continue to manage claims that are not deemed complex.

3.66 Under this option, WorkSafe would need to develop triaging tools and protocols and ensure staff are appropriately skilled to assess and triage claims.

3.67 In all other respects, this option is identical to option 4 and has the same advantages and disadvantages except:

Additional advantage

3.68 Central triaging of claims could lead to greater consistency in identifying complex claims because it would be done by the same workforce, applying the same criteria, and using the same tools.

Additional disadvantages

3.69 In addition to setting up a complex claims unit, WorkSafe would need to develop the infrastructure, skills and resources to manage the triage and assessment of all workers' compensation claims.

- 3.70 The need to triage all claims may mean that the management of non-complex claims will suffer from delays before they are being transferred to agents.

Option 6 — Hybrid claims management model between WorkSafe and agents with an increased decision-making function for WorkSafe

Description of the option

- 3.71 Option 6 provides for a hybrid model in which WorkSafe takes on some of the claims management functions currently undertaken by agents. Agents would continue to conduct many of their current functions with increased decision-making and oversight by WorkSafe.
- 3.72 This option could work in a variety of ways with greater or lesser claims management functions taken on by WorkSafe. It might incorporate elements of the other options described above. The description of 'how it would work' below provides one example of a hybrid claims management model. The Review is interested in any views you may have on an effective hybrid model.

How it would work

- 3.73 Under this option, WorkSafe would take an increased role in decision-making and have a strengthened oversight function. This would apply to all claims, not just 'complex' claims, however these are defined. Under this option, triage of claims would be centralised as described above in option 5. All claims would start with WorkSafe and the triage would be performed by WorkSafe.
- 3.74 The Review has heard that the TAC used agents for claims management for a period but did not delegate decision-making. The Review understands that agents made recommendations, but the TAC made final decisions. A similar approach could be taken by WorkSafe. This option would require clear protocols about which decisions must be made by agents and which must be made by WorkSafe. There would also need to be careful consideration of how to ensure decisions are timely.
- 3.75 The Review understands that WorkSafe's pre-litigated and litigated decision-making for potential common law matters is centralised. WorkSafe reviews and makes decisions on these claims but has an appointed panel of law firms which manage the litigation and make recommendations.
- 3.76 WorkSafe has also established the Workers' Compensation Independent Review Service, which has a decision-making function for workers' compensation claims. It commenced operation on 30 April 2020. The administrative service enables a worker who is not satisfied with an agent's 'reviewable decision' to have that decision reviewed by WorkSafe. Reviewable decisions include those not resolved

at conciliation. Where WorkSafe determines that an agent's decision is not sustainable WorkSafe will instruct the agent to overturn the decision using its powers under the agent agreement. A hybrid model could potentially build on and expand this existing capability to include decision-making for complex claims prior to a dispute arising.

- 3.77 Another hybrid model raised with the Review in submissions is the 'Recovery Model Office' which is a hybrid WorkSafe/ agent pilot co-designed by WorkSafe and Gallagher Bassett. The Recovery Model Office tests new approaches to claims management. The 12-month pilot commenced on 1 June 2020. It is testing a new triaging tool to identify clients in need of tailored support. This model appears to contemplate a degree of shared WorkSafe and agent responsibility for claims management. Claims decision-making remains with Gallagher Bassett, for example treatment approvals and entitlement decisions. WorkSafe provides oversight, support, guidance and evaluation. A hybrid claims management model might be able to build on the Recovery Model Office.

Advantages

- 3.78 This option would provide an increased oversight and decision-making role for WorkSafe. This could help address concerns that the current oversight role taken by WorkSafe is insufficient. It has the potential to lead to more consistent decision-making.
- 3.79 It retains elements of the existing system for the management of claims which may prove less disruptive to those currently in the workers' compensation system.
- 3.80 Continued use of agents would have the benefit of allowing use of the existing agent workforce and infrastructure for claims management.

Disadvantages

- 3.81 This option has the potential to further fragment claims management and delay decisions as aspects of claims management are split between WorkSafe and agents.
- 3.82 There may be a lack of clarity about who is responsible for particular decisions. This could be detrimental for a worker's experience in the scheme, potentially delaying decision-making.
- 3.83 Workers and employers may need to liaise with both WorkSafe and agents, which could be unnecessarily burdensome. Workers and employers may not be clear about who to contact on particular issues.

Option 7 — Abolishment of the agent model, all claims managed directly by WorkSafe

Description of the option

- 3.84 This option would remove the agent model entirely. WorkSafe would manage all claims directly, whether complex or otherwise, rather than agents.
- 3.85 This option could work similarly to WorkSafe Queensland’s workers’ compensation scheme, which directly manages workers’ compensation claims and does not use agents. However, in contrast to the existing Victorian model, the Queensland model has a separate regulator.
- 3.86 WorkSafe Victoria is not currently required to use agents; the law permits it but does not require it. No legislative change would be required. If there was a desire to remove the option of using agents for claims management, legislative changes would be required.

How it would work

- 3.87 All aspects of claims management would be brought in-house to be managed directly by WorkSafe for the life of the claim, from initial triage to exiting the scheme.
- 3.88 Employers would have no choice about who managed their claims as WorkSafe would undertake all claims management functions.
- 3.89 There would need to be transitional arrangements for existing claims to be transferred to WorkSafe.
- 3.90 Under this option, WorkSafe would set up a dedicated unit for complex claims management as described in option 5. However, it would also be responsible for all other claims.
- 3.91 The advantages of option 7 are the disadvantages of option 1 and vice-versa.

Advantages

- 3.92 This option has similar advantages to options 4 and 5 but removes the complexities involved with identifying and transferring complex claims. Compared to options 4 and 5, transferring all claims management to WorkSafe, rather than only complex claims, does not create risks of perverse incentives for agents to transfer difficult claims to WorkSafe.
- 3.93 This model will ensure WorkSafe deals directly with complex claims. Direct management of claims by WorkSafe would ensure that WorkSafe has undivided accountability for the management of these claims. Potential benefits include:

Improving the experience of injured workers

- greater consistency in decision-making;
- development of a worker-centric culture and approach to claims management because the profit or the achievement of financial incentives is not a motivation for decision-making;
- the recruitment, retention and training of quality case managers, which would result in quality case management, decision-making and outcomes for injured workers.

Disadvantages

3.94 This would be a very significant change from the approach to the management of workers' compensation claims in Victoria which has operated since 1985. The existing system for the management of claims is well established and understood by parties who use it, such as WorkSafe, agents, employers, unions, healthcare providers and dispute resolution services. It would create disruption to those currently in the workers' compensation system and would need a substantial education program and carefully planned and timed transition arrangements.

3.95 Transferring all claims management from agents to WorkSafe could result in a lack of continuity of case management for injured workers in the short-term, while the transition occurs.

3.96 Transfer of claims to WorkSafe would present significant infrastructure and staffing challenges. Agents have the staff and supporting infrastructure to manage claims, whereas WorkSafe does not. For WorkSafe to take on the function of claims manager, it would need to recruit suitably skilled staff to manage claims. This would inevitably involve some recruitment from existing agents, effectively shifting the current set of claims managers from one employer to another.

3.97 The financial implications of the change could be very significant.

4. Conclusion

- 4.1 Plainly, in any option for reform, there are key areas that must be addressed which are described across the draft options. These include, but are not limited to, how complex claims are identified, the triage process, and the need for a qualified and experienced claims management workforce.
- 4.2 Accordingly, in making recommendations for the future management of complex claims there are a number of difficult questions that must be answered, including:
- How would complex claims be defined?
 - At what point in the life of a claim, would the decision be made that it is a complex claim?
 - Who would make such a decision and what criteria would be applied?
 - What would be the impact on an injured worker of their claim being transferred either internally within an agent (under option 2), to a single, specialised agent (under option 3) or from an agent to WorkSafe (under option 4)?
 - What would be the impact of the various options on employers?
- 4.3 As described earlier in the options paper, the Ombudsman's reports in 2016 and 2019 were not the first independent government reports to examine the management of claims by the Victorian WorkCover Authority (which now trades as WorkSafe). The Victorian Auditor-General completed two audits of the Victorian WorkCover Authority's claims management systems in 2001-2 and 2009 respectively.
- 4.4 It is against this background of four detailed independent reports in less than 20 years which have been highly critical of the agent model, that it is necessary in this fifth such Review to set a course for the future that maximises outcomes for the people who should be the primary concern of the Victorian workers' compensation system: injured workers.
- 4.5 In light of the pattern of review and piecemeal reform of the agent model, the Review suggests that there is a real question of whether further tinkering with the agent model can address the many systemic deficiencies that have been identified by the reviews including the present one.
- 4.6 It is with this in mind that the Review poses the seven draft options for reform for your consideration and response.

Responding to the options paper

- 4.7 The following questions are provided to guide your written response to the options paper:
1. What factors should the Reviewer consider in identifying a preferred option?
 2. Which option best provides for the effective management of complex claims and why?
 3. What would be required for your preferred option to be implemented?
 4. Is there another option, or combination of options, which could more effectively address the problems identified in the management of complex claims? If so, please describe how it would work.
 5. Are there other considerations that the Reviewer should be aware of, such as unintended consequences of a particular option?
- 4.8 Please limit your submissions to a maximum of 15 pages. Content which you have provided in an earlier submission to the Review need not be repeated. Submissions should be made by emailing the Review team at agentreview@justice.vic.gov.au.
- 4.9 [Information provided in submissions may be quoted or referred to in the Review's Final Report. The report may, at the discretion of the Minister, be publicly released; it may also be subject to disclosure through freedom of information processes. In forming his recommendations for the Final Report, the Reviewer will not be able to refer to views or information provided in confidence.](#)
- 4.10 We invite you to respond to the options paper by **29 January 2021**.

5. Attachment A – Terms of Reference

Review of the Agent Model into the Administration and Management of Complex Claims

Terms of Reference

Background

1. The Victorian Workcover Authority (WorkSafe) is responsible for the administration of Victoria's workers' compensation scheme, known as WorkCover, to ensure it provides support for workers with a work-related injury, is sustainable, fair and affordable to businesses.
2. WorkSafe administers the scheme by delegating most of its claims management and premium collection functions to appointed insurance agents. Agents are required to determine liability and entitlement for all claims in accordance with relevant legislation (principally the *Workplace Injury Rehabilitation and Compensation Act 2013* (WIRC Act)).
3. Collectively, the agents manage around 90,000 claims every year and are remunerated through an annual service fee and financial incentives for achieving performance measures. There are currently five scheme agents whose contracts with WorkSafe expire in June 2021.
4. According to WorkSafe's 2018 Annual Report, most claims managed by agents are neither complex nor contentious, with 59 per cent of injured workers returning to work within 13 weeks, 75 per cent before 26 weeks and 90 per cent prior to 52 weeks.
5. However, once a claim progressed beyond 130 weeks they are defined as complex claims. Complex claims have longer decision timelines, a higher rate of rejection, involve greater lengths of time off work and have a higher rate of disputation over agent decisions.
6. As at 30 June 2018, these claims represented about a quarter of the 18,519 active weekly payments in the scheme, or about seven per cent of the total 63,085 active claims in the scheme (including those involving medical treatment only).

Complex Claims

7. The Victorian Ombudsman undertook an investigation in 2016 into the management of complex workers' compensation claims and Worksafe oversight.
8. The investigation highlighted several deficiencies that indicated a growing number of complex claims were being mishandled by agents, including evidence of:

Improving the experience of injured workers

- a. unreasonable decision-making across all five agents
 - b. agents maintaining unreasonable decisions at conciliation, forcing workers to take the matter to court or terminate their claim without compensation
 - c. financial rewards encouraging agents to focus on rejecting or terminating WorkCover entitlements, and
 - d. limited accountability or oversight mechanisms of agent decisions.
9. In 2019, the Victorian Ombudsman conducted a follow up investigation and found that despite targeted policy and system reforms, little had improved in the handling of complex workers' compensation claims since 2016, with continued unreasonable agent decision making and poor agent culture driven by financial rewards and ineffective WorkSafe oversight.
10. In response, the Ombudsman made 15 recommendations, two to government and 13 to WorkSafe. These Terms of Reference implement Recommendation 1 which stated:

Commission an independent review of the agent model to determine how and by whom complex claims should be managed, taking into account:

- a. the need to ensure appropriate compensation is provided to injured workers, as well as the financial viability of the scheme
- b. the experience of other accident compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international workers compensation jurisdictions.

Scope of Review

11. The Review will assess the suitability, adequacy and effectiveness of the outsourced agent model in the administration and management of complex claims under the *Workplace Injury Rehabilitation and Compensation Act 2013* (the Act).
12. The Review will determine how and by whom complex claims should be managed to maximise outcomes for injured workers having regard to the need to maintain the financial viability of the scheme.
13. For the purpose of the Review, complex claims are defined as those where the injured worker has received 130 weeks or more of weekly payments (including claims that were suspended or terminated during this period).
14. However, irrespective of the complexity of a claim, the Review should consider the personal circumstances of claimants which may ultimately contribute to them having 'complex claims', as defined at 130 weeks.

Improving the experience of injured workers

15. In forming its findings and developing recommendations the Review should inquire into:
 - a. Whether the agent model is effective in delivering and achieving positive health and recovery outcomes, including prompt, effective and proactive treatment and management of injuries.
 - b. Whether case management processes and practices for complex claims reflect best practice and provide tailored treatment and support based on biopsychosocial factors, individual circumstances and medical advice.
 - c. Whether policy, oversight and governance arrangements, including financial and performance incentives support and promote best practice, timely, sustainable and quality decision making by agents.
 - d. Any other matters that the Reviewer deems necessary including any potential system wide implications.
16. In undertaking the Review, the Reviewer will consider:
 - a. the experience of other compensation schemes, including Victoria's transport accident scheme (managed by the Transport Accident Commission) and other national and international compensation jurisdictions or insurance schemes including the National Disability Insurance Scheme;
 - b. the Victorian Ombudsman's Report in 2016 and 2019 into the management of complex workers' compensation claims and WorkSafe oversight;
 - c. the impact of emerging risks which may impact claim numbers and to the viability of the workers' compensation scheme;
 - d. any relevant work that is being or has already been undertaken in this area, including recent or ongoing legislative and regulatory reforms relating to the Act and workers' compensation system; and
 - e. the implications of retaining, limiting or removing agents from performing claim management functions on behalf of WorkSafe.
17. Where the Reviewer finds the policy, legislative or regulatory framework could be improved, the Reviewer must provide recommendations to give effect to such improvements.
18. In forming its recommendations, the Review must have regard to the implications of any changes for the financial viability of the workers' compensation scheme and the cost of WorkCover insurance for employers.